classmates from my Torts section from the preceding year, they asked if I had a TA this year. When I told them that Jane was my TA, their reaction was “of course,” given how smart, organized, and personable she is.

As her application materials surely reflect, Jane is one of the very small cohort of JD-MBA joint-degree students that we admit each year. These are, not surprisingly, among our strongest students. They need to meet the admissions standards of both the law school and the Wharton School. The program allows our law school to compete effectively for incoming students with law schools that are higher in the rankings. JD-MBA students also tend to be among our more unflappable and mature students. They have typically had substantial work experience and they quickly learn to juggle and manage the demands of two highly challenging and very different programs. I would think that these qualities would transfer well to the context of a clerkship. And Jane definitely has them.

Jane is exceptional among JD-MBA students in at least one way. She wants to be a litigator, not a transactional lawyer (or someone who takes legal training into jobs that are not law practice). I wish more of our JD-MBAs would take this path. They are among our most able students and thus would enrich this important dimension of the profession. I think Jane has embarked on this unusual path for a couple of reasons: she sees more opportunity for doing public interest or public-spirited work as a part of her professional life; and she really does love the intellectual process of figuring out rules and how to work with them, which she sees as more interesting in the context of litigation, as an area that will afford her the opportunity to engage in a wider range of substantive areas of the law and their varieties of rules.

In sum, if you hire Jane Black as your clerk, you will have made a very good decision for yourself, your court, and her co-clerks.

Sincerely,

Jacques deLisle
Stephen A. Cozen Professor of Law
Professor of Political Science
Director, Center for the Study of
Contemporary China
Tel.: (215) 898-5781
E-mail: jdelisle@law.upenn.edu

JANE BLACK

1529 Walnut Street, Apartment 1206, Philadelphia, PA 19102
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WRITING SAMPLE

The attached writing sample is an excerpt from my submission to the Penn Law Keedy Cup Moot Court Competition. The assignment required drafting a Supreme Court brief on the question of which tribunal, an Article III court or an arbitrator, should determine whether parties must arbitrate claims brought for antitrust violations. I conducted all of the research necessary for the assignment and alone drafted the brief. I received no edits or feedback on this submission. By the assignment's instructions, the brief could not exceed 10,000 words. The assignment was a two-part issue, however I have included for your review my analysis on behalf of Respondent for the first issue, along with a brief summary of the second issue.

No. 19-963

IN THE
Supreme Court of the United States

HENRY SCHEIN, INC.,

Petitioner,

v.

ARCHER & WHITE SALES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT

COUNSEL FOR RESPONDENT
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104

Counsel for Respondent

February 22, 202

QUESTION PRESENTED

Whether a provision in an arbitration agreement that exempts certain types of claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff Archer & White Sales Inc. ("Archer") is a small business which distributes dental equipment. Defendant Danaher Corporation ("Danaher") is the largest manufacturer of dental equipment. Defendant Henry Schein Inc. ("Schein") and Company X (not a named defendant in this case) are much larger distributors of dental equipment who compete directly with Archer. JA 21. While Schein is the largest distributor of dental equipment in the United States, Archer is known nationwide for its low prices and high-quality service. *Id.*

In 2012, Archer filed an antitrust action against Defendants Schein and Danaher in the District Court for the Eastern District of Texas alleging violations of the Sherman Act and Texas Antitrust Law.[1] The complaint describes a conspiracy among Schein, Danaher, and Company X to terminate or restrict Plaintiff's distribution rights across several territories including Northern Arkansas and Oklahoma. JA 2. The Plaintiff seeks injunctive relief and money damages. In the complaint, in relevant part:

---

[1] *See* section 1 of the Sherman Act, 15 U.S.C. § 1, and the Texas Free Enterprise Antitrust Act ("TFEAA"), TEX. BUS. & COM. CODE ANN. § 15.01. The TFEAA is "construed in harmony with federal judicial interpretations of comparable federal antitrust statutes...." TEX. BUS. & COM. CODE ANN. § 15.04.

> Plaintiff alleges that Schein and Company X have conspired to fix prices and to refuse to compete with each other in the sale of dental equipment to dental professionals. (Compl. at 1–2.) Moreover, Plaintiff alleges that Schein and Company X have conspired with the Manufacturer Defendants to terminate and/or reduce Plaintiff's distribution territory in response to Plaintiff's low prices. (Compl. at 2.) Plaintiff claims that this termination constitutes an illegal boycott, orchestrated by the Defendants to perpetuate the price-fixing agreement and the agreement not to compete between Schein and Company X. (Compl. at 2.) Plaintiff further claims that Danaher, as the common supplier to all three horizontal competitors, knowingly participated in this illegal boycott. (Compl. at 2.) JA 21.

In response, Defendant Schein filed a motion to compel Archer to arbitrate its claims based on a Dealer Agreement between Archer and Defendant Danaher and based on Section 3 of the Federal Arbitration Act. JA 1; 9 U.S.C. § 3. Defendant Schein was not a party to the Dealer Agreement and is nowhere mentioned in its contents. JA 88-102. The Dealer Agreement provides, in relevant part:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement

> (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be in Charlotte, North Carolina. JA 100.

Defendant Danaher is not a party to this appeal. Plaintiff maintains that this action is excluded from the arbitration provision in so far as Archer seeks injunctive relief.

B. Proceedings Below

Following the initial complaint filing, Defendant Schein filed a motion to compel arbitration based on the contents of the Dealer Agreement between Plaintiff and Defendant Schein. JA 1. The motion was referred to a magistrate judge, who issued an order to compel arbitration. JA 14. However, upon review, the District Court reversed on the grounds that the Plaintiff's claims fell outside of the scope of the arbitration agreement. JA 20. On appeal, the Fifth Circuit Court of Appeals affirmed, finding both that the Court had jurisdiction to determine arbitrability and that the claim could not be compelled into arbitration. JA 42. On appeal to this Court, the judgement was vacated based on clarification of the test to determine arbitrability, and the case was remanded to the Court of Appeals to redetermine arbitrability under the new test. JA 60. On remand, the Fifth Circuit again found in favor of the Plaintiff that the Court could determine

arbitrability and that the case could not be compelled into arbitration. JA 70.

SUMMARY OF THE ARGUMENT

I. The Court maintains the authority to determine the arbitrability of the claims. The Defendants cannot meet their burden to show clear and unmistakable evidence that the parties previously agreed to submit arbitrability questions to determination by arbitrators where the remedy sought included injunctive relief. The arbitration provision of the Dealer Agreement provides a carve-out that explicitly excludes actions seeking injunctive relief from mandatory arbitration. Defendants offer no explicit language that can refute the written words. Case precedent supports the assertion that a carve-out need only "arguably cover" the dispute at hand. The question of arbitrability is thus for the Court.

II. The Court should not compel arbitration because the arbitration provision excludes claims for injunctive relief. Further, Defendant Schein is a third-party to the Dealer Agreement with no entitlement to use its contents to deny Plaintiff's right to invoke the jurisdiction of the Court. Courts look for positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Positive assurance is reflected here in the text which explicitly excludes injunctive relief claims. This is both the plain meaning of the words in the Dealer Agreement and consistent with the Dealer Agreement's larger context. In addition, Defendant Schein is a third-party to the Dealer Agreement who

lacks adequate standing to invoke its contents. Defendant Schein also fails to meet the requirements of equitable estoppel because Plaintiff's claim against Defendant Schein is not wholly reliant on the Dealer Agreement, and the Dealer Agreement does not anticipate the relationships among Defendants that are central to this claim.

ARGUMENT

The law protects both the freedom to form contracts and the autonomy to abstain from contracting. U.S. Const. art. 1, § 10, cl. 1. Absent a conflict with existing law or overwhelming government necessity, the intentions of parties through written expression trump other interests. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Thus, courts must treat agreements to arbitrate like any other contract. *See Volt Info. Sci. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Although courts are permitted to consider the public policy interests of arbitration in the absence of an agreement, parties may limit by agreement the claims they wish to submit to arbitration. *See Hartford Acc. & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001).

Defendant Schein's motion to compel arbitration creates two disputes that are answered by resort to the parties' agreement. The first is a gateway question of which court determines the arbitrability of the claims. The second is the arbitrability of the claims themselves. We first explain why this Court is

the proper authority to determine arbitrability; the defendants cannot meet their burden to show clear and unmistakable intention to arbitrate arbitrability. We then provide two distinct reasons why these claims are not arbitrable. The first is because the underlying claim is unambiguously carved out of the arbitration provision, and the second is because Defendant Schein, as a third party to the Dealer Agreement, cannot invoke the arbitration clause within it.

I. The Court Should Decide Arbitrability Because There Is No Clear and Unmistakable Delegation in the Dealer Agreement.

Questions of arbitrability are "undeniably an issue for judicial determination." *AT&T Techs. v. Commc'ns Workers*, 475 U.S. 643, 650 (1986). Arbitrability disputes are narrowed to include disagreements "about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id.* at 651-52. There exists a narrow exception to the presumption of judicial supremacy when the moving party can show "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc. v. DynMcDermott Petrol Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012). The agreement at issue contains clear evidence of the opposite intention and omits any language that could indicate an intent to delegate arbitrability.

A. The Dealer Agreement Specifically Omits Suits Seeking Injunctive Relief from the Arbitration Clause

When looking for clear and unmistakable evidence of intent to arbitrate arbitrability, courts often rely on an express delegation provision. *See, e.g., Aviles v. Russell Stover Candies, Inc.*, 559 Fed.Appx. 413, 415 (5th Cir. 2014). Contrary to clear and unmistakable evidence of intent to arbitrate arbitrability, the agreement here specifically omits the present claim from arbitration altogether through the carve-out for injunctive claims.

Even when parties include unmistakable delegation to arbitrators, courts have been deferential to even the possibility that a carve-out includes the question of arbitrability. *See NASDAQ OMX Group, Inc. v. UBS, Sec., LLC*, 770 F.3d 1010, 1032 (2d Cir. 2014). In proceedings following the involvement of Nasdaq and UBS in a third party initial public offering, UBS sought to compel Nasdaq's claims into arbitration based on Nasdaq's "Service Agreement" with its members. *Id.* at 1013. The subject agreement reads, in relevant part:

> Except as may be provided in the NASDAQ OMX Requirements, all claims, disputes, controversies, and other matters in question between the Parties to this Agreement … relating to this Agreement, or to the breach hereof, shall be settled by final binding arbitration in accordance with this Agreement and the following procedure or such other procedures as may be mutually agreed upon by the Parties…. Except as otherwise provided herein or

> by agreement of the Parties, any arbitration proceeding shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association or in accordance with such other rules and procedures as are agreed to by the Parties.

Nasdaq, 770 F.3d at 1016.

Another section of the Service Agreement carves-out "losses, damages, or other claims arising out of the Nasdaq Market Center or its use." *Id.* at 1033. Based on the Service Agreement terms, the court dismissed UBS's claim that arbitrability should be reserved to the arbitration tribunal. They found that an agreement does not clearly and unmistakable delegate arbitrability "where a broad arbitration clause is subject to a qualifying provision that *at least arguably covers* the present dispute." *Id.* at 1031 (emphasis added). The mere presence of the carve-out, without explicit language defining its inclusion for purposes of arbitrability, was sufficient to negate the claim. *Id.*

While Nasdaq found a carve-out buried in another section of the Service Agreement to "arguably cover" the dispute, the Dealer Agreement at issue in this case presents an even stronger physical and contextual nexus. Plaintiff Schein and Defendant Danaher included a carve-out within the arbitration clause. The explicit and unambiguous language "except for actions seeking injunctive relief" contained in the arbitration clause itself, is more than the mere "arguably covered" bar set in *Nasdaq*. 770 F.3d at

1033. We discuss in Part II this same language as considered under the standard for determining the arbitrability of the claim. However, for the gateway question, Defendants have failed to show unmistakable intent to defer arbitrability questions.

B. Invoking the AAA is not sufficient to override the presumption of judicial supremacy

To meet their burden even without a clear carve-out, Defendants would need to "point to a clear and unmistakable expression of the parties' intent to submit arbitrability disputes to arbitration." *Nasdaq*, 770 F.3d at 1032. Defendants thus argue that the Arbitration clause's second sentence, which broadly invokes AAA rules, negates the specific exclusion that precedes it. However, they rely on case law that considers agreements without a specific carve-out. *See Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 256 (5th Cir. 2014). This analysis elides the issue. Case law consistently shows that courts first look for specific language omitting claims before interpreting broad language like the invocation of AAA rules. *See Nasdaq*, 770 F.3d at 1033; *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 62 (2nd Cir. 1996).

Even without a specific carve-out, as present here, it is untrue that mere mention of the AAA rules, alone, without some broader indication in the provision of the parties' intent, favors arbitration. Following this Court's holding in this case's prior proceedings which redefined the test for arbitrability gateway disputes, the WDPA District Court in

HealthPlanCRM, LLC v. AvMed, Inc. expressed concern when cases fail to question the status quo and instead "simply state, without much analysis, that incorporation of AAA rules is a sufficiently 'clear' delegation." 458 F. Supp. 3d 308, 322 (W. Dist. Pa. 2020). The court pointed to several Third Circuit cases that "do more than scour the relevant contract for the magic letters 'AAA.'" *Id.* at 323, *referencing Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 758 (3d Cir. 2016). The *AvMed* Court applied Third Circuit cases requiring that courts "must scrutinize the precise language of the arbitration clause at issue and ensure that it truly manifests a clear intent to delegate arbitrability to the arbitrator." *Id.*

To support the replacement of a blanket rule, the *HealthPlanCRM* court invoked the logical stages of contract drafting. 458 F. Supp. 3d at 323. As examples of what could otherwise refute the presumption of federal court jurisdiction over the question of arbitrability, the court looks for (1) narrow language when referencing the AAA (2) referencing a specific set of AAA rules such as the "Commercial Arbitration Rules" (3) invoking specific AAA rules that are mandating rather than permissive in language (4) the absence of judicial carve-outs "such as a carve-out for injunctive relief" and (5) a lack of sophistication of the parties. *See Id.* 324-26.

This Court, when weighing these factors, should find that the Dealer Agreement is overwhelmingly broad and cannot support an inference of intent. The Dealer Agreement's language invoking the AAA makes no reference to specific

rules, thus invoking both permissive and mandatory rules over a breadth of documents. In addition, with the exception of the clear carve-out, the language referencing the AAA is boilerplate and general rather than narrow. JA 100. Thus, these factors, in conjunction with the carve-out that more than arguably covers the dispute at hand, grant the Court a clear path to jurisdiction over this case.

We reiterate that the Court need not reach analysis of the AAA provision. Arbitrability precedent and the principles of contract law clearly provide that where a contract contains a broad provision and a narrow applicable provision, the narrow provision shall rule the day. *See Nasdaq*, 770 F.3d at 1033; Restatement (Second) of Contracts § 203(c). Thus, based on the specific language excluding cases seeking injunctive relief, and the absence of clear and unmistakable language in the Dealer Agreement delegating arbitrability, the Court should decide the issue of arbitrability.

Defendants also erroneously claim that ruling in favor of the Plaintiff on the gateway question prematurely determines whether the claim is arbitrable. As the lower courts confirmed and analysis below reiterates, the question of arbitrability of the merits is determined under a different legal standard than the question of delegation. JA 2. As such, the Court is free to conduct separate and independent analysis on these two questions, and a finding in favor of the Plaintiff on the gateway question will not taint the determination of the merits question.

II. The Claim Is Not Arbitrable Because Injunctive Claims Are Explicitly Excluded from the Dealer Agreement, and, Defendant Schein Is Not a Party to the Dealer Agreement

To determine arbitrability of a claim, "We look first to whether the parties agreed to arbitrate a dispute, not to general policy goals." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). The court determines if there was an intention to arbitrate and "If the parties make such an intention clear, the federal policy favoring arbitration must yield." *Hartford Acc. & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001). Courts employ a two-part test to resolve disputes with regard to arbitrability. First, they inquire "whether a valid agreement to arbitrate some claims exists" and second "whether the dispute at hand falls within the terms of that valid agreement". *Dealer Computer Servs. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009).

All parties agree to the existence of an arbitration agreement between Plaintiff and Defendant Danaher. The present dispute focuses on whether this dispute falls within the terms of that agreement. This claim is not arbitrable on two distinct grounds. First, injunctive relief claims are explicitly carved out of the Dealer Agreement. Second, Defendant Schein is a third-party to the Dealer Agreement and lacks evidence of an exception that would allow him to invoke its clauses.

(Analysis omitted)

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the District Court ruling which denies the Motion to Compel Arbitration be affirmed.

Applicant Details

First Name	**Matthew**
Last Name	**Bolin**
Citizenship Status	**U. S. Citizen**
Email Address	**mattbolin32@gmail.com**
Address	**Address** Street **301 West 57th Street 15D** City **New York** State/Territory **New York** Zip **10019** Country **United States**
Contact Phone Number	**203-722-3217**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**December 2016**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 19, 2020**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of European Law**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hogg, Courtney
hoggc@brooklynda.org
Mitts, Joshua
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(212) 854-7797
Talley, Eric
etalley@law.columbia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Matthew Bolin
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(203) 722-3217 • mattbolin32@gmail.com

March 2, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman,

I am a graduate of Columbia Law School, where I was a James Kent Scholar, and am currently a second-year litigation associate at Davis Polk. I am writing to apply for a clerkship in your chambers for the 2024 term.

Enclosed please find my resume, law school transcript, undergraduate transcript, and writing sample. Also enclosed are letters of recommendation from Professor Eric Talley (212 854-0437, etalley@law.columbia.edu), Professor Joshua Mitts (212 854-7797, joshua.mitts@law.columbia.edu), and Courtney Hogg (718 250-3225, hoggc@brooklynda.org), a Deputy Bureau Chief at the Kings County District Attorney's Office and Lecturer in Law at Columbia Law School.

Thank you for your consideration.

Respectfully,

Matthew Bolin

MATTHEW BOLIN

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EDUCATION

Columbia Law School, New York, NY
J.D., May 2020
Honors: James Kent Scholar
Dean's Honors in International Securities Regulation
Semifinalist, ABA National Negotiation Competition (2018)
First Place, ABA Regional Negotiation Competition (2017)
Second Place, Columbia Law School Negotiation Competition (2017)
Activities: Columbia Negotiation Association, President 2018
Columbia Journal of European Law
OutLaws

Washington University in St. Louis, St. Louis, MO
B.A. in Political Science, Minor in Art History, Dec. 2016

EXPERIENCE

Davis Polk & Wardwell LLP, New York
Associate Nov. 2020-present
Summer Associate May-July 2019
Recognition: Legal Aid Society 2021 *Pro Bono Publico* Award
Davis Polk Pro Bono Honor Roll
Conduct legal research, write legal memos, draft segments of briefs, and cite check.
Pro Bono: draft criminal appeal briefs, apply for resentencing under Domestic Violence Survivors Justice Act, and assist New York State Justice Task Force in investigating potential reforms to criminal justice system.

Kings County District Attorney's Office, New York
Intern Jan.-May 2019
Managed misdemeanor caseload of approximately twenty cases. Interviewed victims and police and conducted legal research.

United States Court of Appeals for the First Circuit, San Juan, Puerto Rico
Law Clerk Intern to the Hon. Juan R. Torruella May-July 2018
Wrote bench memos, cite checked, and conducted legal research.

Family Court of St. Louis County, St. Louis, MO
Intern Jan.-May 2017
Attended hearings and analyzed videotaped testimony and medical evidence.

Office of U.S. Congresswoman Rosa DeLauro, New Haven, CT and Washington, DC
Intern Dec. 2014-Jan. 2015; June-Aug. 2015
Fielded constituent phone calls relating to casework and policy concerns, read and organized constituent emails and drafted replies, updated case files, and gave tours of the Capitol.

INTERESTS: Running, ancient art, cooking.

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CLS TRANSCRIPT (Unofficial)

09/16/2021 16:00:42

Program: Juris Doctor

Matthew Tyler Bolin

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	CR
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	CR
L6424-1	International Securities Regulation	Greene, Edward	2.0	CR
L6391-1	Regulation of Financial Institutions	Judge, Kathryn	3.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	A
L6675-1	Major Writing Credit	Katz, Avery W.	0.0	CR
L6274-2	Professional Responsibility	Fox, Michael Louis	2.0	B+
L8115-7	S. Negotiation Workshop	Woodin, Peter	3.0	A
L6683-1	Supervised Research Paper	Katz, Avery W.	2.0	CR
L6294-1	Trusts and Estates	Rapaczynski, Andrzej	4.0	A

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6204-1	Administrative Law	Metzger, Gillian	4.0	A-
L6622-1	Columbia Journal of European Law		0.0	CR
L6239-1	Ex. Criminal Prosecution	Hogg, Courtney; Weiner, Frances	2.0	A
L6239-2	Ex. Criminal Prosecution: Fieldwork	Hogg, Courtney; Weiner, Frances	3.0	CR
L6423-1	Securities Regulation	Mitts, Joshua	4.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6536-1	Bankruptcy Law	Mann, Ronald	4.0	A-
L9069-1	C. Law and Economics	Talley, Eric; Underhill, Kristen	2.0	A
L6622-1	Columbia Journal of European Law		0.0	CR
L6231-3	Corporations	Judge, Kathryn	4.0	A
L8898-1	S. Intelligence Law [Minor Writing Credit - Earned]	Litt, Robert S.; Waxman, Matthew C.	2.0	B+

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Greene, Jamal	4.0	B+
L6108-3	Criminal Law	Scott, Elizabeth	3.0	B+
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	B+
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-16	Legal Practice Workshop II	Fiddelman, Jacob Ross	1.0	P
L6118-1	Torts	Huang, Bert	4.0	B+

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2017

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Genty, Philip M.	4.0	B+
L6105-4	Contracts	Talley, Eric	4.0	A
L6113-1	Legal Methods	Ginsburg, Jane C.	3.0	CR
L6115-23	Legal Practice Workshop I	Louk, David S; Newman, Mariana	2.0	P
L6116-1	Property	Merrill, Thomas W.	4.0	A-

Total Registered Points: 17.0

Total Earned Points: 17.0

Total Registered JD Program Points: 84.0

Total Earned JD Program Points: 84.0

Dean's Honors

A special category of recognition in Spring 2020 awarded to the most outstanding students in each course (top 3-5%).

Semester	Course ID	Course Name
Spring 2020	L6424-1	International Securities Regulation

Honors and Prizes

UNOFFICIAL

Academic Year	Honor / Prize	Award Class
2019-20	James Kent Scholar	3L
2018-19	James Kent Scholar	2L
2017-18	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	32.0

UNOFFICIAL

Washington University Unofficial Transcript for: **Matthew (Matt) Tyler Bolin**
Student ID Number: 429321
Student Record data as of: 10/11/2021 9:04:30 AM

HOLDS - no records of this type found

DEGREES AWARDED

MINOR IN ART HISTORY AND ARCHAEOLOGY	Dec 21, 2016
A.B. MAJOR IN POLITICAL SCIENCE	Dec 21, 2016

MAJOR PROGRAMS

---------Semester---------				Prime	
Admitted	**Terminated**	**Status**	**Code**	**or Joint**	**Program**
FL2014	FL2016	Completed	LA3201	Prime	A.B. MAJOR IN POLITICAL SCIENCE
SP2015	SP2016	Closed	LA14M1	Joint	MINOR IN ENGLISH
FL2013	FL2014	Closed	LA0001	Prime	A.B. UNDECLARED MAJOR
FL2015	FL2016	Completed	LA01M3	Joint	MINOR IN ART HISTORY AND ARCHAEOLOGY

ADVISORS

Advisor	Advisor Type	Start Dt	End Dt	Program	Email
Francis Lovett	Faculty Advisor	8/18/2016	1/20/2017	LA3201 A.B. MAJOR IN POLITICAL SCIENCE	flovett@WUSTL.EDU
William E. Wallace	Faculty Advisor	11/11/2015	1/20/2017	LA01M3 MINOR IN ART HISTORY AND ARCHAEOLOGY	WWALLACE@WUSTL.EDU
J. Dillon Brown	Faculty Advisor	1/20/2015	4/17/2016	LA14M1 MINOR IN ENGLISH	jdbrown@WUSTL.EDU
Ian MacMullen	Faculty Advisor	11/6/2014	8/18/2016	LA3201 A.B. MAJOR IN POLITICAL SCIENCE	imacmull@artsci.wustl.edu
Joy Zalis Kiefer	Program Advisor	7/10/2014	1/20/2017		jkiefer@WUSTL.EDU
Jeffrey Brent Hamilton	A&S Four Year Advisor	7/31/2013	1/20/2017		jbhamilt@WUSTL.EDU

SEMESTER COURSEWORK AND ACADEMIC ACTION

Note: Courses dropped with a status of 'D' will not appear on your transcript.
Courses dropped with a status of 'W' will appear on your transcript.

FL2013

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L01 Art-Arch	113	01	3.0	C	A-	A				History of Western Art, Architecture & Design
L01 Art-Arch	113	K	0.0							History of Western Art, Architecture & Design
L07 Chem	111A	01	3.0	C	A	A-				General Chemistry I
L07 Chem	111A	GG	0.0							General Chemistry I
L07 Chem	151	02	2.0	C	B	B				General Chemistry Laboratory I
L07 Chem	151	H	0.0							General Chemistry Laboratory I
L14 E Lit	159	01	3.0	C		A-				Literature Seminar for Freshmen: Literature and Justice
L30 Phil	131F	01	3.0	C		B+				Present Moral Problems

Enrolled Units: 14.0 **Semester GPA:** 3.58 **Cumulative Units:** 29.0 **Cumulative GPA:** 3.58

SP2014

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L07 Chem	112A	02	3.0	C	B	B+				General Chemistry II
L07 Chem	112A	M	0.0							General Chemistry II
L07 Chem	152	01	2.0	C	B	B				General Chemistry Laboratory II
L07 Chem	152	G	0.0							General Chemistry Laboratory II
L30 Phil	375	01	3.0	C		A				Existentialism
L41 BIOL	2651	01	1.0	P		CR#				MedPrep Program-Experience in Life Sciences
L41 BIOL	2960	02	4.0	C	A	B				Principles of Biology I
L41 BIOL	2960	P	0.0							Principles of Biology I
L59 CWP	100	16	3.0	C	A-	A				College Writing 1

Enrolled Units: 16.0 **Semester GPA:** 3.46 **Cumulative Units:** 45.0 **Cumulative GPA:** 3.52

MSN 8102 SPRING WRITING PLACEMENT, Approved to enroll in Writing 1 **Transcript:** No **Expires** 12/31/2999
MSN 8110 WRITING 1 REQUIREMENT STATUS, Satisfied **Transcript:** No **Expires** 12/31/2999

FL2014

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L01 Art-Arch	232	01	3.0	C		A				Myths and Monuments of Antiquity
L14 E Lit	2152	02	3.0	C		A				Literature in English: Modern Texts and Contexts
L18 URST	101	01	3.0	C		B+				Introduction to Urban Studies
L32 Pol Sci	106	01	3.0	C	A-	A-				Introduction to Political Theory
L32 Pol Sci	3103	01	3.0	C		A-				Topics in Politics: Interchangeables, Influentials, and Essentials

Enrolled Units: 15.0 **Semester GPA:** 3.74 **Cumulative Units:** 60.0 **Cumulative GPA:** 3.59

MSN 1125 PRAXIS: TOOLS FOR THE WORLD OF WORK **Transcript:** Yes **Expires** 12/31/2999

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

SP2015

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L01 Art-Arch	111	01	3.0	C		A-				Introduction to Asian Art
L01 Art-Arch	111	A	0.0							Introduction to Asian Art
L14 E Lit	2151	01	3.0	C		A-				Literature in English: Early Texts and Contexts
L32 Pol Sci	102B	01	3.0	C		A				Introduction to Comparative Politics
L32 Pol Sci	358	01	3.0	C		A				Law, Politics and Society
L32 Pol Sci	363	01	3.0	C		A				Quantitative Political Methodology
L32 Pol Sci	363	C	0.0							Quantitative Political Methodology

Enrolled Units: 15.0 **Semester GPA:** 3.88 **Cumulative Units:** 75.0 **Cumulative GPA:** 3.67

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

SU2015

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L32 Pol Sci	4001	09	3.0	C		A				American Democracy and the Policy-Making Process

Enrolled Units: 3.0 **Semester GPA:** 4.00 **Cumulative Units:** 78.0 **Cumulative GPA:** 3.68

FL2015

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L32 Pol Sci	331	01	3.0	C		A+				Topics in Politics: Special Topics in Law, Politics, and Society
L32 Pol Sci	419	25	3.0	C		A+				Teaching Practicum in Political Science
L84 Lw St	312	06	3.0	C		A				Argumentation
L84 Lw St	3507	01	3.0	C		A				Legal Conflict in Modern American Society

Enrolled Units: 12.0 **Semester GPA:** 4.00 **Cumulative Units:** 90.0 **Cumulative GPA:** 3.73

SP2016

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L01 Art-Arch	3889	01	3.0	C		A				The Architectural Imaginary: Dialogues Between Art and Architecture in the Twentieth Century
L01 Art-Arch	429	01	3.0	C		A				Art and Death in Ancient Rome
L32 Pol Sci	3431	01	3.0	C		A				Constitutional Law
L74 HBRW	359	01	3.0	C		A				Travelers, Tricksters, and Storytellers: Jewish Travel Narratives and Autobiographies, 1100-1800

Enrolled Units: 12.0 **Semester GPA:** 4.00 **Cumulative Units:** 102.0 **Cumulative GPA:** 3.77

MSN 0042 POLITICAL SCIENCE SUBFIELD CONCENTRATION:, American Politics **Transcript:** Yes **Expires** 12/31/2999

SU2016

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L48 Anthro	3155	01	3.0	C		A				Politics and Religion in Contemporary Society
L48 Anthro	3352	01	3.0	C		A				Politics, Religion, and Art in Antiquity: Representations in Paris

Enrolled Units: 6.0 **Semester GPA:** 4.00 **Cumulative Units:** 108.0 **Cumulative GPA:** 3.79

FL2016

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L01 Art-Arch	299	20	1.0	P		CR#				Internship in the Art Community
L01 Art-Arch	4624	01	3.0	C		A				Michelangelo
L14 E Lit	3522	01	3.0	C		A				Topics in Literature: Transatlantic Foreignisms
L32 Pol Sci	3280	01	3.0	C		A+				Political Intolerance in World Politics
L48 Anthro	4134	01	3.0	P		CR				The AIDS Epidemic: Inequalities, Ethnography, and

Ethics

Enrolled Units: 13.0 **Semester GPA:** 4.00 **Cumulative Units:** 121.0 **Cumulative GPA:** 3.80

HON 0039 COLLEGE HONORS IN A&S **Transcript:** Yes **Expires** 12/31/2999

SP2017

Department	Course	Sec	Units	Grade Opt	Grade Mid	Grade Final	Grade Dean	Dropped	WaitListed	Title

Enrolled Units: 0.0 **Semester GPA:** 0.00 **Cumulative Units:** 121.0 **Cumulative GPA:** 3.80

HON 0200 PI SIGMA ALPHA - POLITICAL SCIENCE HONOR SOCIETY **Transcript:** Yes **Expires** 12/31/2999

OTHER CREDITS

Semester	Dept	Course	SIS	Title	Type	Units	AP	Design	Topics	Code Met	Art Sci	Comments
FL2013	L22	0001		HISTORY ELECTIVE		0.00	3.00					Advanced Placement
School:				**Other Title:**						**Original Grade:**		
FL2013	L22	163		Freedom, Citizenship, and the Making of American Culture		0.00	3.00					Advanced Placement
School:				**Other Title:**						**Original Grade:**		
FL2013	L32	101B		American Politics		0.00	3.00					Advanced Placement
School:				**Other Title:**						**Original Grade:**		
FL2013	L41	100A		An Introduction to Biology		0.00	6.00					Advanced Placement
School:				**Other Title:**						**Original Grade:**		
FL2013	L43	9999		Total Credit Granted By Prematriculation Units		15.00						
School:				**Other Title:**						**Original Grade:**		

GPA SUMMARY

Semester	Semester Units Cr. Att.	Semester Units Cr. Earn	Semester Units P/F Att.	Semester Units P/F Earn	Semester Units Trans.	Semester Units Grade Pts.	Cumulative Units Cr. Att.	Cumulative Units Cr. Earn	Cumulative Units P/F Att.	Cumulative Units P/F Earn	Cumulative Units Trans.	Level Units	GPA Sem.	GPA Cum.	Level
FL2013	14.0	14.0	0.0	0.0	15.0	50.1	14.0	14.0	0.0	0.0	15.0	29.0	3.58	3.58	2
SP2014	15.0	15.0	1.0	1.0	0.0	102.0	29.0	29.0	1.0	1.0	15.0	45.0	3.46	3.52	4
FL2014	15.0	15.0	0.0	0.0	0.0	158.1	44.0	44.0	1.0	1.0	15.0	60.0	3.74	3.59	5
SP2015	15.0	15.0	0.0	0.0	0.0	216.3	59.0	59.0	1.0	1.0	15.0	75.0	3.88	3.67	6
SU2015	3.0	3.0	0.0	0.0	0.0	228.3	62.0	62.0	1.0	1.0	15.0	78.0	4.00	3.68	6
FL2015	12.0	12.0	0.0	0.0	0.0	276.3	74.0	74.0	1.0	1.0	15.0	90.0	4.00	3.73	7
SP2016	12.0	12.0	0.0	0.0	0.0	324.3	86.0	86.0	1.0	1.0	15.0	102.0	4.00	3.77	7
SU2016	6.0	6.0	0.0	0.0	0.0	348.3	92.0	92.0	1.0	1.0	15.0	108.0	4.00	3.79	8
FL2016	9.0	9.0	4.0	4.0	0.0	384.3	101.0	101.0	5.0	5.0	15.0	121.0	4.00	3.80	8

ENROLLMENT STATUS

Semester	Start	End	Enrollment Status	Level	Units	Status Change Date
FL2013	8/27/2013	12/18/2013	Full-Time Student	1	14.0	
SP2014	1/13/2014	5/16/2014	Full-Time Student	3	16.0	
FL2014	8/25/2014	12/17/2014	Full-Time Student	3	15.0	
SP2015	1/12/2015	5/6/2015	Full-Time Student	5	15.0	
SU2015	5/18/2015	8/13/2015	Less Than Half-Time Student	6	3.0	
FL2015	8/24/2015	12/16/2015	Full-Time Student	6	12.0	
SP2016	1/19/2016	5/11/2016	Full-Time Student	7	12.0	
SU2016	5/23/2016	8/18/2016	Half-Time Student	8	6.0	
FL2016	8/29/2016	12/21/2016	Full-Time Student	8	13.0	

DEMOGRAPHICS

Birthdate: 5/4/1995
Birth Place: Atlanta GA
Date of Death:
Gender: M
Marital Status:

Race: 6 - White (Non-Hispanic Origin)
Hispanic: N
American Indian: N
Asian: N

Semester of Entry: FL2013
Entry Status: F
Anticipated Deg Dt: 2017
Std Expt Graduation:
Frozen Cohort: FR2017LA

Veteran Code:
Locale: 0
U.S. Citizen: Y
Country: USA
Visa Type:
Nonresident Alien: N

Black: N
Hawaiian
Pacific: N
White: Y
Not Reported: N

Faculty/Staff Child:
Alumni Code:
Prof. School1: PL
Prof. School2:
Area of Interest:
Area of Interest Code: 00

ADMINISTRATIVE CODES

Type	Value
Personal Email Address	mattbolin32@aol.com

HIGH SCHOOL

Name	Code	GPA	Weight	Class Size	Class Rank
Weston High School	070913	3.93			

PREVIOUS SCHOOLS - no records of this type found

UNIVERSITY EMAIL ADDRESS: mtbolin@wustl.edu **FORWARDS TO:** mattbolin32@aol.com

March 02, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I met Matt Bolin when he externed with the Kings County District Attorney's office in the Spring of 2019 and emailed in the corresponding Criminal Prosecution seminar, which I taught. I therefore have the benefit of knowing Matt in both the classroom and the courtroom. In both settings, Matt demonstrated the strong analytical skills and willingness to engage with opposing viewpoints that are needed to be an effective clerk.

The Criminal Prosecution seminar was designed to both teach students the fundamental concepts they would need to manage their caseloads and push them to think critically about the criminal justice system more generally. The seminar had only a handful of students and was highly participation driven so I quickly became familiar with Matt in an academic setting. Matt has strong analytical abilities and repeatedly demonstrated his skill in considering nuanced problems from multiple perspectives. Throughout the semester, Matt listened closely to opposing viewpoints, sincerely evaluated the strength of the arguments presented and reformed his ideas accordingly.

While at the Kings County District Attorney's office, Matt worked a two-day week and managed a misdemeanor caseload of around twenty cases. This required him to contact victims, collect supporting depositions, interview officers, and conduct legal research. Throughout his time at the DA's office, Matt demonstrated the same willingness to consider the multiple facets of an issue as he did in the classroom and he exhibited both empathy and strong interpersonal skills throughout his communications with victims and witnesses.

Matt's interest in the justice system has been enduring and his passion is evident. As an undergraduate, Matt mentored youths involved in the family court system and upon graduating a semester early, he remained in St Louis in order to intern with the Family Court before starting law school. He then spent the summer following his first year of law school interning with the First Circuit.

The depth and diversity of Matt's experience this early in his career give him a well-rounded perspective that greatly enhanced class discussions and would help him be an effective clerk. His ability and willingness to thoughtfully consider opposing viewpoints make Matt an excellent candidate.

Sincerely,

Courtney Hogg
Deputy Bureau Chief
hoggc@brooklynda.org.

March 02, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am writing to strongly and enthusiastically recommend Matthew Bolin for a clerkship in your Chambers. I have had the pleasure of getting to know Matt over the past two years and I am utterly confident that he deserves my unqualified recommendation.

I first met Matt when he was a student in my 'Securities Regulation' class in Spring 2019. The class is a technically challenging one, by design, requiring students to master both legal and economic theory before marrying that with the way courts rule in practice. It was also small in terms of size, which enabled me to get to know each of the students on a more personal basis and leave them no place to hide. Matt certainly did not need that place to hide, being more than capable of grappling with the material and standing out as one of the most promising and intellectually engaged students I had. He regularly contributed in class and office hours, proving himself to be comfortable both with close readings of judicial rulings and regulations as well as with attending to the bigger questions of economic and policy considerations underpinning rulemaking. I was not surprised to see Matt finish the class with an A grade but I was nonetheless delighted to see that his hard work had paid off.

Aside from his obvious legal aptitude, one of the aspects of Matt's personality that really marked him out was his breadth of intellectual engagement and genuine ability to engage with both sides of a dispute. One of the key questions over the course of my class was the position of activist short sellers in the market, an issue which shows no sign of going away and provokes plenty of interesting arguments. On the one hand, they often play a vital role in exposing badly-positioned corporations who could otherwise hide behind positive public pronouncements but, on the other hand, they can also seem to be fairly unscrupulous individuals profiting off short-term dislocations regardless of long-term value. Matt was able to hold both of these interpretations in his mind alongside important policy considerations such as fairness and efficiency, an ability which will prove vital in his career as a clerk.

Since graduating in 2020, Matt has been pursuing a career in private practice, an arena in which I have no doubt he will enjoy considerable success. But I was delighted to hear that he would be applying for judicial clerkships as I think it is a role that will suit his expansive and rigorous mind. It gives me great pleasure to write this letter as I have no doubt that he will be a star in this role and I support his application wholeheartedly. This would be an incredible opportunity for him and if you take him on as a clerk I guarantee that you will not regret it.

If I can be of assistance in any way as you consider this very strong applicant, please don't hesitate to call or email me.

Sincerely,

Joshua Mitts
Associate Professor of Law

Joshua Mitts - joshua.mitts@law.columbia.edu - (212) 854-7797

March 02, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I write to offer my strong recommendation of Mr. Matt Bolin, a 2020 graduate of Columbia Law School and current associate at Davis Polk, in connection with his application for a clerkship in your chambers. I have had the pleasure of knowing Matt for four years (as of this writing), and I have found him to be one of the most delightful and engaged students I have taught and advised in recent memory. To cut to the chase, Matt has the makings of an excellent lawyer, an intellectual leader, and—perhaps most important for your purposes—a superb clerk. I recommend him strongly, with no reservations.

I first became acquainted with Matt when he was assigned to my small section of Contracts in the Fall of 2017. As you well know, this is a foundational course in law school, and success in it is a particularly salient benchmark for future performance. You are also probably aware from reading his transcript that he excelled in the class, earning an A for the course on the basis of an exceedingly strong exam (the second highest raw score for the class, and neck-and-neck with the top exam). What does not come out of Matt's transcript is the depth of his thinking and the incredibly thoughtful interventions that he made regularly in class. He has a keen ability to pierce into the most important aspect of a case for doctrine and/or policy, and to push me and his colleagues to dig a little deeper. It was a delight to see him engage with the subject matter and to engage others.

I next had the pleasure of having Matt in my upper-division Law and Economics course in the fall of 2018 (co-taught by myself and Kristen Underhill). He once again – unsurprisingly – was superb, earning (another) A in the course, and making important and helpful interventions on a routine basis. Students can find this course to be challenging, since they are required to read and react to cutting-edge scholarship by lawyers and economists; and the articles often involve relatively technical statistical techniques and/or mathematical derivations. But Matt had zero problems with the challenge, and moreover he displayed a unique and enviable skill of being able to "translate" technical arguments into common-sense intuitions. He was so good at this skill, in fact, that I secretly wished the authors of several of the papers we studied would simply let him rewrite their introductions and conclusions.

Finally, and above and beyond the formidable intellectual traits described above, I would be remiss not to close this letter with a few words about Matt as a person. Within a few minutes of meeting him, it's hard not to notice how engaged, articulate, and thoughtful Matt is. This much was clear to me by the end of the first class session of my Contracts class in 2017. Some students (and professors) can find such manifest engagement off-putting, particularly to the extent that it appears the student is a "gunner" endeavoring to perform intelligence in front of others. But that never seemed to happen with Matt. Both I and his colleagues quickly realized that he had a genuine, curious, nerdy, and insatiable appetite for thinking about the law. It was genuinely infectious, and he played a critical role in turning his small section into a cohesive, thoughtful, and supportive group. Most of them will be friends and colleagues for life – and I will be right there with them.

If you have any questions about this exceptional candidate, please do not hesitate to contact me at the email address and number above.

Sincerely,

Eric L. Talley
Sulzbacher Professor of Law

Eric Talley - etalley@law.columbia.edu

Writing Sample

Matthew Bolin
301 West 57th St., Apt. 15D, New York, NY 10019
(203) 722-3217 • mattbolin32@gmail.com

The enclosed writing sample is a memo analyzing the strength of a claim for breach of the implied covenant of good faith and fair dealing under Delaware law. The names of the parties and the facts giving rise to the potential claim have been altered to maintain confidentiality. This memo has not been edited by anyone else.

Memorandum

To:	File
From:	Matt Bolin
Re:	Strength of Client's Implied Covenant of Good Faith and Fair Dealing Claim Under Delaware Law

This memorandum analyzes the strength of Client's claim under Delaware law that Counterparty breached the implied covenant of good faith and fair dealing in the LLC agreement ("LLCA") by exercising its operational discretion in bad faith with the improper purpose of reducing Client's payout on selling its interest in Company, LLC ("Company") pursuant to terms described in further detail below.

Under the terms of the LLCA, Counterparty had sole discretion to manage the affairs and business of Company. However, as discussed in more detail below, under Delaware law, the implied covenant required Counterparty to exercise this discretion in good faith. To succeed on a claim that Counterparty violated this obligation to act in good faith, Client would need to show that Counterparty's discretionary actions in managing Company were driven by the desire to depress the value of Company and reduce Client's payout. Based on the evidence currently available, Client likely has a colorable, if challenging, claim that Counterparty violated the implied covenant.

I. Facts

Client and Counterparty are the sole members of Company, which produces and sells Widget A. Under the terms of the original LLCA, which was entered into in 2014, Counterparty had a majority interest in Company (60%) and could appoint three members of Company's board of directors. Client had a 40% interest in Company and could appoint the remaining two board members.

Company became very successful, nearly doubling in value just five years after it was created, despite experiencing losses in its first two years. In February of 2019, Counterparty approached Client with a plan to expand Company's operations to producing Widget B, in addition to producing Widget A. Counterparty believed that Company's existing infrastructure, which was designed to produce Widget A, uniquely situated Company to quickly become a key player in the Widget B market as the widgets have similar manufacturing requirements and supply chains.

Although Company could leverage its existing infrastructure, entering into the Widget B market would require significant resources. Convinced that the expansion would dramatically increase the value of Company, but unable to contribute a sufficient amount of capital, Client agreed in April of 2019 to amend the original LLCA so that Counterparty would invest the majority of the necessary capital for the expansion. Specifically, the amended LLCA reduced Client's interest in Company to 30% and provides that Counterparty will cause Company to repurchase Client's interest in Company after four years at its fair market value at such time ("Exit Price"). Client has contemporaneous emails showing that this deferred repurchase was designed to allow Client to share in the success of Company after it entered into the Widget B market, and that the parties expected the fair market value of Company to take several years to reflect the value of the expansion.

In addition, the amended LLCA provides Counterparty with authority to "direct the operations and business of Company in its sole discretion" and allows Counterparty to appoint all of Company's directors. LLCA § 4.12(c). The amended LLCA further provides that Company's members and directors do not owe fiduciary duties to Company or its members, and

that each member (and its appointed directors) may act in the member's own best interest. *Id*. § 10.6(a).

The amended LLCA does not provide a timeline for Company to commence its expansion into the Widget B market, though it does acknowledge that the parties anticipated the expansion in several provisions. *See, e.g., id*. § 2.1 ("In anticipation of expansion into the Widget B market…"). Client states that it agreed to grant Counterparty sole discretion to manage Company because it believed their interests were aligned in maximizing the value of Company. However, Counterparty ultimately deferred its plans to expand Company's operations to producing Widget B until February of 2022—just one year before the Exit Price was due—citing unanticipated market disruptions from the COVID-19 pandemic.

Client is skeptical of Counterparty's justification for two reasons: 1) delaying the expansion ensures that there will not be enough time for the fair market value to accurately reflect the increased value of Company arising from entering into the Widget B market; and 2) Company's Widget A business has continued to be successful (though less successful than in previous years) despite the fact that Widget A and Widget B largely share the same disrupted supply chains. Client now seeks advice on the strength of a breach of the implied covenant claim on the theory that Counterparty is intentionally suppressing the value of Company in order to diminish the payout owed to Client.

II. Analysis

a. The implied covenant applies to and is limited by the LLCA

Although not found within the four corners of the LLCA, the covenant of good faith and fair dealing "inheres in every contract and requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the

contract from receiving the fruits of the bargain." *Narrowstep, Inc. v. Onstream Media Corp.*, No. CIV.A. 5114-VCP, 2010 WL 5422405, at *10 (Del. Ch. Dec. 22, 2010) (internal quotation marks omitted). Even the LLCA's waiver of fiduciary duties does not vitiate the implied covenant. *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013).

To sustain a claim for breach of the implied covenant, Client "must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to [Client]." *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009). Because the covenant works to imply good faith as a condition of any contractual grant of discretion, Client's claim that Counterparty abused its discretion to deprive Client of the full value of the Exit Price would constitute a viable claim if borne out by the evidence. *See, e.g.*, *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 503–04 (Del. 2019) (noting that "the vesting of a Board with discretion does not relieve the Board of its obligation to use that discretion consistently with the implied covenant of good faith and fair dealing").

However, the implied covenant does not apply equally to all contractual grants of discretion. "[W]hat is 'arbitrary' or 'unreasonable'—or conversely 'reasonable'—depends on the parties' original contractual expectations, not a 'free-floating' duty applied at the time of the wrong." *Gerber v. Enter. Prod. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013). Therefore, parties "can decide to prescribe what 'reasonably' means in their agreement." *Stewart v. BF Bolthouse Holdco, LLC*, No. CV 8119-VCP, 2013 WL 5210220, at *17 (Del. Ch. Aug. 30, 2013).

In this case, the fact that the LLCA permits Counterparty to act in its "sole discretion" and consider its own interest serves to curtail the implied covenant. *Miller v. HCP Trumpet*

Investors, LLC, 194 A.3d 908, 908 n.5 (Del. 2018) ("[T]he application of the implied covenant can be narrowed by using the words 'sole discretion' along with language saying that the party granted that discretion may consider only such interests and factors as it desires, including its own interests, and eliminating any duty or obligation to give any consideration to any interest of or factors affecting the entity or its investors.").

The LLCA further narrows the implied covenant by waiving fiduciary duties. Delaware courts have made clear that a plaintiff may not use the implied covenant to receive more than it bargained for and that the "elimination of fiduciary duties implies an agreement that losses should remain where they fall." *Lonergan v. EPE Holdings*, 5 A.3d 1008, 1018–1019 (Del. Ch. 2010) (stating that plaintiffs cannot "re-introduce fiduciary review through the backdoor of the implied covenant"). Because Client has granted Counterparty "sole discretion" while waiving fiduciary duties, it could not have reasonably expected that Counterparty would enter into the Widget B market on a timeframe that maximizes Counterparty's Exit Price.

b. The implied covenant requires discretion to be exercised in good faith

Though the language of the LLCA limits the applicability of the implied covenant, the "the law presumes that parties never accept the risk that their counterparties will exercise their contractual discretion in bad faith." *SerVaas v. Ford Smart Mobility LLC*, No. CV 2020-0909-LWW, 2021 WL 3779559, at *10 (Del. Ch. Aug. 25, 2021) (internal quotation marks omitted). Indeed, the Delaware Supreme Court has recognized that even where a party is granted the right to act in its "absolute judgment"—*i.e.*, sole discretion—it must act with a "proper motive" and exercise its judgment or discretion with "sincerity, honesty, fair dealing and good faith" and not "caprice or bad faith." *See Oxbow*, 202 A.3d at 504 n.93 (citing *Blish v. Thompson Automatic Arms. Corp.*, 64 A.2d 581, 597 (Del. 1948)). A party acts in bad faith or with an improper

purpose if "the parties would have prohibited the conduct had they contemplated it." *Charlotte Broad., LLC v. Davis Broad. of Atlanta, L.L.C.*, No. CV13C04143WCCCCLD, 2015 WL 3863245, at *6 (Del. Super. Ct. June 10, 2015), *aff'd*, 134 A.3d 759 (Del. 2016).

Here, Client reasonably expected that Counterparty/Company would continue to pursue Widget B expansion in good faith as the parties were planning Company's imminent Widget B expansion when they signed the amendment to the LLCA. Indeed, this initiative was the premise for amending the original LLCA. However, the parties did not provide a timeline in the LLCA, presumably because they understood there to be a benefit in providing Company and Counterparty flexibility. Furthermore, Client stated that it afforded Counterparty discretion under the LLCA because it believed that Counterparty's self-interest in Company's success was sufficient protection for Client. To date, Client has not offered any evidence as to why this theory was flawed, which could prove lethal to an implied covenant challenge.

Moreover, Counterparty claims it chose to delay Company's expansion for legitimate business reasons—*i.e.*, because crucial supply chains were disrupted by the COVID-19 pandemic—and the implied covenant does not require that a party exercise its discretion in favor of the other party when it has good-faith reasons not to do so. In fact, Delaware courts have been sympathetic to situations where a party unexpectedly exercises its discretion to the detriment of its counterparty in response to unforeseen circumstances. For example, in *Airborne Health, Inc. v. Squid Soap, LP*, the court concluded that no implied-covenant claim existed where the purchaser in an M&A transaction failed to maximize an earn-out payment due to the seller by not investing adequate capital in the target during the earn-out period because bad faith was not alleged. 984 A.2d 126, 146–47 (Del. Ch. 2009). Rather, the allegations made clear that the purchaser, mired in a series of litigations that had become a public relations nightmare

threatening the viability of the company, had "suffered a corporate crisis in its core business and, at least in part as a result of that crisis, did not expend resources" on the target. *Id.* at 147.

Client does not deny that the COVID-19 pandemic disrupted relevant supply chains for the production of Widget B, but asserts that such disruptions were an inconvenience, not a "crisis," citing the fact that Company remained successful in spite of facing similar supply chain issues for the production of Widget A. Should the court find this argument persuasive, it may determine that Counterparty's delay of the Widget B expansion was "part of a larger scheme to… deprive" Client the benefits of its bargain in violation of the implied covenant. *SerVaas*, 2021 WL 3779559, at *10 (finding plaintiffs adequately alleged breach of the implied covenant where they asserted defendant improperly exercised a contractual right to terminate them in order to avoid paying their bonuses).

However, before bringing suit, Client should determine whether there are any facts suggesting that Company's success in Widget A is not relevant. For example, Company was already established in the Widget A market prior to the pandemic—the very fact that Company would have to establish itself in a new market may be a meaningful consideration. Moreover, the supply chains of the widgets are not identical and it is conceivable that Widget B's supply chain was more disrupted by the pandemic.

c. It is unclear whether alleging "mixed motives" would be sufficient

If the court finds Client's argument compelling, it may determine that Counterparty's stated motivation is pretextual and in violation of the implied covenant. Conversely, the court may determine that Client's argument is only partially persuasive and Counterparty was both motivated by the bad faith desire to suppress the Exit Price and the challenges posed by the

supply chain disruptions. This raises the question of whether the actions of a party motivated both by legitimate business reasons and bad faith violate the implied covenant.

In *Amirsaleh v. Board of Trade of City of New York, Inc.*, No. CIVA.2822-CC, 2009 WL 3756700, at *5 (Del. Ch. Nov. 9, 2009), the court held that "to prove bad faith a plaintiff must demonstrate that the defendant's conduct was motivated by a culpable mental state"—"[i]n other words" that "the defendant's conduct must be ***driven by*** an improper purpose." *Id.* (emphasis added). The court did not elaborate on the meaning of "driven by" (nor does there appear to be a case that does so). In the absence of clearer guidance, it would be reasonable to conclude that being "*driven by* an improper purpose" either requires that (1) the improper purpose must be the predominant purpose or (2) a defendant is "driven by" an improper purpose if, but for the improper purpose, the defendant would not have engaged in the conduct at issue.

Regardless of what exactly "driven by" requires, Client should be mindful that merely alleging bad faith played some part in Counterparty's decision to delay the expansion is not enough. Instead, Client would need to establish that the desire to diminish the Exit Price was Counterparty's predominant or "but-for" purpose. For example, if Client could demonstrate that Company's continued success in producing Widget A throughout the pandemic is a reasonable proxy for forecasting the viability of an undeferred expansion into the Widget B market to the satisfaction of the court, Client would have an argument that Counterparty's stated motivation is pretextual. And with the only justification offered discredited, a court may determine Counterparty's true motivation to be the improper purpose of diminishing the Exit Price.

III. Conclusion

Delaware courts have made clear that the implied covenant serves as a guardrail on contractual grants of discretion. Though the provisions of the LLCA restrict the scope of the

implied covenant, Counterparty was still required to act in "good faith." In other words, Counterparty was obligated to operate Company honestly and sincerely, and could not operate Company with the purpose or intent of diminishing Company's fair market value and, consequently, Client's Exit Price.

It would be an uphill battle to overcome Counterparty's claim that it delayed the Widget B expansion due to COVID-19-related supply chain disruptions, especially given that violating the implied covenant under Delaware law may require a party exercise its discretion predominantly with an improper motive. However, Company's continued success throughout the pandemic, despite Widget A having a similar supply chain to Widget B, discredits Counterparty's assertion and provides Client with a colorable implied covenant claim.

Applicant Details

First Name	**Nicholas**
Last Name	**Bottcher**
Citizenship Status	**U. S. Citizen**
Email Address	**nicholasbottcher2022@nlaw.northwestern.edu**
Address	**Address** Street **520 W Cornelia Ave Apt 311** City **Chicago** State/Territory **Illinois** Zip **60657**
Contact Phone Number	**5034676384**

Applicant Education

BA/BS From	**University of Oregon**
Date of BA/BS	**June 2012**
JD/LLB From	**Northwestern University School of Law** **http://www.law.northwestern.edu/**
Date of JD/LLB	**May 13, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Criminal Law and Criminology**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Julius H. Miner Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate
Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Rountree, Meredith
meredith.rountree@law.northwestern.edu
(312) 503-0227
Crocker, Sarah
sarahcrockerovca@gmail.com
(312) 435-5624
Kugler, Matthew
matthew.kugler@law.northwestern.edu
(312) 503-3568
Holman, Rebekah
rebekah.holman@law.northwestern.edu
(312) 503-1704
Bini, Mark
Mark.Bini@usdoj.gov
(718) 254-8761

This applicant has certified that all data entered in this profile and any application documents are true and correct.

NICK BOTTCHER
520 W Cornelia Avenue, Apt. 311, Chicago, IL 60657 • nicholas.bottcher@law.northwestern.edu • 503-467-6384

March 1, 2022

The Honorable Lewis J. Liman
United States District Court, Southern District of New York
500 Pearl Street
New York, New York 10007-1312

Dear Judge Liman:

Enclosed please find an application for a clerkship in your chambers for 2024–25. I am a third-year student at Northwestern Pritzker School of Law with six years of experience working in public accounting prior to law school. In the long term, my aim is to advocate for victims of financial crimes as an Assistant United States Attorney in New York. Working in your chambers would be an invaluable opportunity to learn from your experiences as a former AUSA and experienced advocate.

My externship in the Northern District of Illinois for Judge Franklin Valderrama has prepared me to contribute meaningfully to your chambers. During the experience I learned how to approach legal questions as an impartial decision-maker and decipher opaque briefs to reach the conclusion that justice requires. Working with Judge Valderrama and his clerks in a collegial atmosphere confirmed my passion for legal writing and my desire to continue honing these skills as a law clerk.

My application includes a resume, law school transcript, undergraduate transcript and writing sample. Letters of recommendation from the following individuals have been added to the application by the Law School:

> Mark Bini, Former Assistant United States Attorney, Eastern District of New York
> Mbini@reedsmith.com; (718) 812-1031
>
> Sarah Crocker, Career Clerk for Judge Franklin U. Valderrama
> Sarah_crocker@ndil.gov; (608) 212-4242
>
> Professor Rebecca Holman, Northwestern Pritzker School of Law
> Rebekah.holman@law.northwestern.edu; (312) 503-1704
>
> Professor Matthew Kugler, Northwestern Pritzker School of Law
> Matthew.kugler@law.northwestern.edu; (312) 503-3568
>
> Professor Meredith Martin Rountree, Northwestern Pritzker School of Law
> Meredith.rountree@law.northwestern.edu; (312) 503-0227

I would be thrilled to have the opportunity to interview with you for this position. Please contact me if you need any additional information.

Respectfully,

Nick Bottcher

NICK BOTTCHER
520 W Cornelia Avenue, Apt. 311, Chicago, IL 60657 • nicholas.bottcher@law.northwestern.edu • 503-467-6384

EDUCATION

Northwestern Pritzker School of Law, Chicago, IL
Candidate for Juris Doctor, May 2022
GPA: 3.81

- JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Executive Editor
- Teaching Assistant, Criminal Law, Professor Meredith Martin Rountree, Fall 2020
- Research Assistant, Professor Emily Kadens, Summer 2020 (Mail and wire fraud)
- 2021-2022 Julius H. Miner Moot Court, Co-Chair
- 2020-2021 Julius H. Miner Moot Court, Competitor (Round 4 Best Speaker)
- High-Tech Law Society, 3L Advisor; Federal Bar Association, 3L Advisor

University of Oregon, Eugene, OR
Bachelor of Arts in Accounting, *cum laude*, June 2012
GPA: 3.85

- Men's Ultimate Frisbee – UO Club Sports
- Intervarsity Campus Ministry
- Study Abroad in Sevilla, Spain, Fall 2011

EXPERIENCE

Katten Muchin Rosenman LLP, Chicago, IL
Summer Associate, May 2021-July 2021

- Wrote memoranda assessing equitable defenses for a contract dispute including estoppel, laches, and waiver.
- Drafted an answer to a complaint, interrogatories, and initial document requests for an employment dispute.

U.S. District Court, Northern District of Illinois, Chicago, IL
Judicial Extern to the Honorable Franklin U. Valderrama, January 2021-April 2021

- Assisted in drafting opinions deciding motions to dismiss, motions to remand, and motions for summary judgment.

U.S. Department of Justice, Antitrust Division, Chicago, IL
Law Student Intern, September 2020-November 2020

- Wrote memoranda analyzing joint venture defense to alleged bid rigging and assertion of attorney-client privilege.
- Drafted subpoena attachment to obtain evidence for a "no poach" investigation.
- Inspected and compared documents created by competitors for evidence of bid rigging.

United States Attorney's Office, Eastern District of New York, Brooklyn, NY
Law Student Intern, June 2020-August 2020

- Prepared response to habeas corpus petition concerning whether certain offenses are categorical crimes of violence.
- Wrote memoranda analyzing and making recommendations on issues including loss calculations for an FCPA violation, bank fraud, ineffective assistance of counsel, unlicensed money transmitting businesses, and honest services fraud.
- Wrote sentencing memoranda for securities fraud cases.
- Reviewed interview documents to determine whether statements to federal agents included admissions of guilt.

PwC, Portland, OR
Senior Assurance Associate, July 2016-May 2019;
Assurance Associate, August 2013-June 2016; *Intern*, June 2012-August 2012, January 2013-March 2013

- Supervised financial statement audits for publicly-traded and privately-held clients with annual fees as much as $4M.
- Researched accounting and auditing standards to ensure that complex transactions were recorded within the financial information in accordance with Generally Accepted Accounting Principles.
- Reviewed financial statements for accuracy of balances, internal consistency, and adequacy of disclosures.
- Examined accounting processes to find weaknesses or risks; determined the related implications for the audit.

ADDITIONAL INFORMATION

Licenses and Certifications: Certified Public Accountant, Eagle Scout

Volunteer Activities: Pro Bono Small Business Clinic (Spring 2020); Ladder Up Tax Prep (Winter 2020); PwC Friends of the Children (Winter 2017 & 2016); Catholic Charities (Fall 2013); Kids International Ministries, Philippines (Fall 2012)

Interests: Running, mountaineering, rock climbing, backpacking, brewing beer, kettlebells

Northwestern
PRITZKER SCHOOL OF LAW

UNOFFICIAL GRADE SHEET

THIS IS NOT AN OFFICIAL TRANSCRIPT

The Northwestern University School of Law permits the use of this grade sheet for unofficial purposes only.
To verify grades and degree, students must request an official transcript produced by the Law School.

Name:	**Nick Bottcher**	Total Earned Credit Hours:	77.000
Matriculation Date:	2019-09-02	Total Transfer Credit Hours:	0.000
Program(s):	Juris Doctor	Cumulative Credit Hours:	77.000
		Cumulative GPA:	3.815

Term	Term GPA	Course	Course Title	Credits	Grade	Professor
2019 Fall	3.499	BUSCOM 510	Contracts	3.000	B+	Nzelibe,Jide Okechuku
		CRIM 520	Criminal Law	3.000	A-	Nadler,Janice
		LAWSTUDY 540	Communication& Legal Reasoning	2.000	A	Holman,Rebekah
		LITARB 530	Civil Procedure	3.000	B+	Pfander,James E
		PPTYTORT 530	Property	3.000	B+	Shoked,Nadav
2020 Spring	0.000	CONPUB 500	Constitutional Law	3.000	CR	Kitrosser,Heidi D
		CONPUB 617S	Local Government Law	3.000	CR	Shoked,Nadav
		LAWSTUDY 541	Communication& Legal Reasoning	2.000	CR	Holman,Rebekah
		PPTYTORT 550	Torts	3.000	CR	Speta,James B
		PPTYTORT 650	Intellectual Property	3.000	CR	Pedraza-Farina,Laura Gabriela
2020 Summer	4.330	LAWSTUDY 712	ALW:Comm with Professionals	2.000	A+	Hill,Dana L
2020 Fall	3.835	BUSCOM 634	Derivatives	2.000	A	Kluchenek,Matthew
		BUSCOM 650	Antitrust Law	3.000	A-	McGinnis,John O
		CONPUB 754	Cybercrime	3.000	A	Kugler,Matthew Brett
		CRIM 608	Practicum: Criminal Law	4.000	A-	Main,Scott Frederick
		LAWSTUDY 717	AI and Legal Reasoning	2.000	A	Linna,Daniel Waino
2021 Winter	4.000	LAWSTUDY 696	ALW: Intro to Judicial Writing	2.000	A	Brown,Janet Siegel
2021 Spring	3.890	CONPUB 647	Practicum: Judicial	4.000	A	Wilson,Cynthia A
		CONPUB 650	Federal Jurisdiction	3.000	A-	Redish,Martin H
		CRIM 610	Constitutional Crim Procedure	3.000	A	Rountree,Meredith Martin
		LAWSTUDY 620A	Advanced Legal Writing	3.000	A	Holman,Rebekah
		LITARB 510	Complex Civil Litigation	2.000	A-	St Eve,Amy J
2021 Summer	3.890	CRIM 694	Criminal Law, Race, and Blame	1.000	A-	Nadler,Janice
		LITARB 670S	Negotiation Workshop	2.000	A	Carrel,Alyson M

Run Date: 2/14/2022 Run Time: 8:39:35 AM

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UNOFFICIAL GRADE SHEET

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To verify grades and degree, students must request an official transcript produced by the Law School.

Term	Term GPA	Course	Course Title	Credits	Grade	Professor
2021 Fall	3.924	LAWSTUDY 620	Advanced Legal Research	2.000	A	Willis,Clare Gaynor
		LITARB 605	Trial Advocacy ITA	4.000	A	Lubet,Steven
		LITARB 606	Evidence (ITA)	3.000	A-	Burns,Robert P
		LITARB 730	Clinic: Litigation & Protectio	4.000	A	Tenenbaum,Jack Samuel
2022 Spring	0.000	CONPUB 600	Administrative Law	3.000		Lee,Yoon-Ho Alex
		LITARB 600P	Leg. Ethics: Public Int.&Gov	2.000		Muchman,Wendy
		LITARB 656	Remedies	3.000		Lupo,James
		LITARB 730	Clinic: Litigation & Protectio	4.000		Tenenbaum,Jack Samuel
		TAXLAW 681	Inv, Prosec & Def of Tax Crime	2.000		Johnson,Jenny Louise

Run Date: 2/14/2022 Run Time: 8:39:35 AM

DuckWeb Information System

Display Transcript

Info: This is **NOT** an official transcript. Courses in progress may also be included on this transcript.

Notations of Academic Warning appear on this Unofficial Transcript for your information only; Academic Warning notations do NOT appear on the Official Transcript. Official Transcripts are free (up to five per day or 30 in a year) and can be ordered in DuckWeb. Please send your Official Transcripts whenever you need your record released (for grad school admission, employment, etc).

High School:	**Lake Oswego High School, Jun 06, 2008**
Admit Term:	**Fall 2008**
Matric Term:	**Fall 2008**
UO Degrees:	**Bachelor of Arts, Jun 18, 2012**
	Cum Laude
Major:	**Accounting with departmental honors**
Minor:	**Economics**

Transfer Work

Attendance Period	Institution	Attempted Hours
07S-08S	Advanced Placement Exam	24.00

Term:	Fall 2008	**Major:**	Pre-Business Administration	**Level:**	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
BA	101	Intro to Business >2	A	4.00	16.00	
MUS	125	Understanding Music >1	A	4.00	16.00	
PHIL	101	Philosophical Problems >1	A-	4.00	14.80	
WR	121	College Composit I	A	4.00	16.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	16.00	16.00	16.00	62.80	3.92

End-of-term Academic Standing:	Good Standing
Deans List Notation:	Dean's List

Term:	Winter 2009	Major:	Pre-Business Administration	Level:	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
ASTR	123	Galax & Expand Univers >3	A	4.00	16.00	
MATH	111	College Algebra >5	A	4.00	16.00	
REL	102	World Relig: Near East >1	A	4.00	16.00	
WR	123	College Composit III	A	4.00	16.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	16.00	16.00	16.00	64.00	4.00

End-of-term Academic Standing:	Good Standing
Deans List Notation:	Dean's List

Term:	Spring 2009	Major:	Pre-Business Administration	Level:	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
DSC	240	Managing Business Info	A	4.00	16.00	
PHIL	103	Critical Reasoning >1	A	4.00	16.00	
PHYS	155	Phys Behind Internet >3	A+	4.00	17.20	
PSY	202	Mind and Society >2	A-	4.00	14.80	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	16.00	16.00	16.00	64.00	4.00

End-of-term Academic Standing:	Good Standing
Deans List Notation:	Dean's List

Term:	Fall 2009	Major:	Pre-Business Administration	Level:	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
ACTG	211	Intro Accounting I	A	4.00	16.00	
MATH	251	Calculus I >4	A	4.00	16.00	
PS	204	Intro Comparative Pol >2	B	4.00	12.00	
SPAN	111	Intens Begin Spanish	A	5.00	20.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	17.00	17.00	17.00	64.00	3.76

End-of-term Academic Standing:	Good Standing
Deans List Notation:	Dean's List

Term:	Winter 2010	Major:	Pre-Business Administration	Level:	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat

ACTG	213	Intro Accounting II	A	4.00	16.00	
MATH	242	Calc Bus & Soc Sci II >4	P	4.00	.00	
PEF	291	Speed and Agility	P*	1.00	.00	
SPAN	112	Intens Begin Spanish	A-	5.00	18.50	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	14.00	14.00	9.00	34.50	3.83

End-of-term Academic Standing:	Good Standing

Term:	Spring 2010	**Major:**	Accounting	**Level:**	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
ACTG	360	Cost Accounting	A	4.00	16.00	
BE	325	Glob/Legal/Soc Env Bus	A	4.00	16.00	
EC	313	Interm Macroec Theory	A	4.00	16.00	
SPAN	201	2nd Year Spanish	A	4.00	16.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	16.00	16.00	16.00	64.00	4.00

End-of-term Academic Standing:	Good Standing
Deans List Notation:	Dean's List

Term:	Fall 2010	**Major:**	Accounting	**Level:**	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
BA	352H	Leadership & Communic	B+	4.00	13.20	
FIN	311H	Ec Found Compet Analy	A-	4.00	14.80	
MGMT	321H	Manag Organizations	B	4.00	12.00	
PEW	211	Weight Training I	P*	1.00	.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	13.00	13.00	12.00	40.00	3.33
End-of-term Academic Standing:	Good Standing				

Term:	Winter 2011	**Major:**	Accounting	**Level:**	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
ACTG	350	Intermed Accounting I	A	4.00	16.00	
FIN	316H	Financial Management	A	4.00	16.00	
MKTG	311H	Mktg Management	A-	4.00	14.80	
SPAN	202	2nd Year Spanish	A	4.00	16.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	16.00	16.00	16.00	62.80	3.92
End-of-term Academic Standing:	Good Standing				
Deans List Notation:	Dean's List				

Term:	Spring 2011	**Major:**	Accounting	**Level:**	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
ACTG	351	Intermed Accounting II	B+	4.00	13.20	
DSC	330H	Business Statistics	A+	4.00	17.20	
DSC	340H	Business Info Systems	A-	4.00	14.80	
SPAN	203	2nd Year Spanish	A	4.00	16.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	16.00	16.00	16.00	61.20	3.82

End-of-term Academic Standing:	Good Standing
Deans List Notation:	Dean's List

Term:	Fall 2011	**Major:**	Accounting	**Level:**	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
OSVL	288	SPAN: Culture & Civ >1	A	5.00	20.00	
OSVL	288	SPAN: 2nd Year Spanish	B+	5.00	16.50	
OSVL	288	SPAN: 2nd Year Spanish	A	5.00	20.00	
OSVL	388	MGMT: Global Economy	A	5.00	20.00	
OSVL	388	EC: European Union	A	5.00	20.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	25.00	25.00	25.00	96.50	3.86

End-of-term Academic Standing:	Good Standing
Deans List Notation:	Dean's List

Term:	Winter 2012	**Major:**	Accounting	**Level:**	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
ACTG	440	Audit & Info Systems	A-	4.00	14.80	
ACTG	470	Intro Federal Taxation	A-	4.00	14.80	
BA	453H	Bus Strategy & Plan	A-	4.00	14.80	
DSC	335	Operations Management	A-	4.00	14.80	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	16.00	16.00	16.00	59.20	3.70

End-of-term Academic Standing:	Good Standing

Term:	Spring 2012	**Major:**	Accounting	**Level:**	Undergraduate

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
ACTG	352	Intermediate Actg III	A	4.00	16.00	
ACTG	450	Adv Financial Actg	A	4.00	16.00	
EC	380	Intl Econ Issues >2	A	4.00	16.00	
PERS	271	Tennis I	P*	1.00	.00	
PERU	331	5K Training I	P*	1.00	.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	14.00	14.00	12.00	48.00	4.00

End-of-term Academic Standing:	Good Standing

Transcript Totals

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	195.00	195.00	187.00	721.00	3.85
Transfer:	24.00	24.00			
Transfer Deductions:		.00			
Overall:	219.00	219.00	187.00	721.00	3.85

RELEASE: 7.2[UO.2]

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NORTHWESTERN PRITZKER SCHOOL OF LAW

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am delighted to have the opportunity to recommend Nick Bottcher to you. He was my teaching assistant for my first year Criminal Law class in Fall 2020 and this spring he was enrolled in one of my classes.

Mr. Bottcher was a terrific teaching assistant. To help manage the challenges of remote learning, I was allowed three teaching assistants. I met weekly with the team to check in on how class was going from their perspectives. Mr. Bottcher was an excellent sounding board as I worked through approaches to online instruction. In addition, he clearly developed a very collegial and productive rapport with his co-TAs.

I place a range of responsibilities on my teaching assistants, including responding to student questions, reviewing and commenting on short legal memos the first-year students write for the class, and helping them prepare for an in-class oral argument exercise. Mr. Bottcher excelled in each role, giving students specific, detailed guidance. He was an asset to me, his fellow TAs, and the students in the class.

This Spring, Mr. Bottcher was one of my students in Constitutional Criminal Procedure, a doctrinal course that covers the regulation of the police through the Fourth, Fifth, and Sixth Amendments. In our discussions, he demonstrated he reads cases carefully and analyzes them well. I was therefore not surprised that he earned an A in the class.

In closing, I will simply say that I firmly believe Mr. Bottcher would make an outstanding addition to your chambers. He does excellent work and is a real pleasure to work with. If you have any questions at all, please do not hesitate to contact me. It really is my pleasure to write to you on his behalf.

Respectfully,

Meredith Martin Rountree
Senior Lecturer
Northwestern Pritzker School of Law

Meredith Rountree - meredith.rountree@law.northwestern.edu - (312) 503-0227

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 South Dearborn Street
Chicago, Illinois 60604

Sarah Crocker
Career Law Clerk to the
Honorable Franklin U. Valderrama

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to strongly recommend Nicholas (Nick) Bottcher for a position as a law clerk in your Chambers.

I am a career law clerk for the Honorable Franklin U. Valderrama, a District Court Judge in the Northern District of Illinois. During my time clerking for Judge Valderrama and another District Judge in the Northern District of Illinois, I have supervised over a dozen judicial externs. Nick Bottcher is one individual I have worked with who stands out.

During his time in Judge Valderrama's Chambers, Nick wrote two full opinions deciding motions to dismiss, in addition to completing several discreet research, writing, and copyediting assignments. Nick was a strong analytical thinker and writer from the beginning of his externship, but his research became more nuanced and his written analysis simultaneously tighter and more thorough throughout the semester. Nick's quick improvement from very good to great was due to his own initiative; he not only asked thoughtful questions before beginning an assignment, but also followed up upon completion of each assignment to discuss any areas of improvement.

I supervised Nick for the second opinion that he wrote, in which the Court partially granted and partially denied a motion to dismiss a five-count employment discrimination case under 42 U.S.C. § 1981. The briefs in support and against dismissal were sparse on supporting case law, so much of Nick's research was necessarily independent. What's more, the opinion required him to research myriad questions of law he had never encountered before, including several complicated close questions. To resolve those questions, Nick and I had several long conversations during which he articulately explained the state of the law and the arguments for and against the outcome he advanced. I was impressed with his understanding of the issues and ultimately agreed with his recommendations, as did Judge Valderrama. We asked Nick to complete the opinion on a tight deadline, which he did with no complaints despite a busy semester. His final product flowed well and included thoughtful analysis about each element of each claim.

Nick's research and writing abilities are not his only strength, however. Nick was a pleasure to work with because of his enthusiasm about learning about the law—he listened to many telephonic hearings and always stayed on the phone afterwards to ask Judge Valderrama and the law clerks questions about the legal issues, the parties' arguments, and what did or did not work when advocating for a position. During those calls, and on more low-key virtual get-togethers, Nick impressed me with his wit and positive attitude. Nick was a pleasure to work with and to interact with.

If you need more information or specific examples, please do not hesitate to contact me at (608) 212-4242 or by email at sarah_crocker@ilnd.uscourts.gov. I would be happy to further elaborate on my time working with Nick.

Sincerely,

Sarah C. Crocker
Career Law Clerk to the
Honorable Franklin U. Valderrama

NORTHWESTERN PRITZKER SCHOOL OF LAW

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am writing this letter of recommendation on behalf of Nick Bottcher. Over the last year, Nick has impressed me as an intelligent and hard-working person with great potential. I have no doubt that he will be an excellent clerk.

I first met Nick the Fall of 2020 when he took my seminar on Cybercrime. This class requires students to write a series of response papers, to participate actively in class discussion, and to write a final paper that is the product of original research. Nick did well in this environment. He wrote consistently excellent response papers, often identifying weak points in cases, including many that I had planned to raise in class or that had been the subject of academic scholarship. Looking back at his responses, he was often willing to dive more deeply into the details of the technology or doctrine than were other students. This led him to have some especially good thoughts about the Fourth Amendment and searches of computers.

For his final paper, Nick wrote about virtual asset forfeiture. As you may know, there has been an active policy debate over the last several years about the excesses of civil asset forfeiture. Some law enforcement agencies appear to have been using it too readily, exemplified in the successful 8th Amendment challenge to the forfeiture of a vehicle several years ago. Efforts to rein in these abuses creates problems in the cybercrime context, however. Cybercrime cases are sometimes brought against international actors whose persons and resources are difficult to reach with normal law enforcement tools. Cryptocurrency in particular is often both mobile and extremely difficult to trace. Seizing virtual assets promptly is therefore an important part of cybercrime enforcement.

Nick reviewed a number of proposed forfeiture reforms and identified several that would create problems in the cybercrime context. Specifically, it had been proposed that the government be liable for treble damages in the event of a successfully challenged forfeiture and also that the standard be raised to clear and convincing evidence. These, particularly in combination, could be great problems given the rapidity with which virtual forfeitures must be enacted and the difficulty of collecting international evidence. Nick analyzed the existing literature on forfeiture reform and created a proposal for exempting virtual forfeiture from those provisions.

This paper struck me as promising for two reasons. First, Nick was swimming upstream against the weight of the existing secondary literature. Given the number of forfeiture horror stories, most people writing in this area are pushing for less forfeiture without much regard to protecting forfeiture where it makes the most sense. Nick was willing to take on the extra burden of being different and insisting that, at least in this context, there was something that was truly valuable about forfeiture that should be preserved.

Second, Nick regularly checked in during his writing process and was highly responsive to feedback. He was one of those who circled back to me after the semester for further comments to incorporate as he reworked his paper into a journal note. To me, this shows that he recognizes that good writing can always be better. In a similar vein, he is enrolled in advanced legal writing this spring.

This is just one of the ways in which Nick has shown a willingness to grow and improve. He showed a similar willingness to work on public speaking. Nick tended to be quiet in class. He was always ready with intelligent comments if I called on him – I use student response papers as a basis for “warm calls” in my seminar – but he seemed to have some anxiety about talking in front of a group. This is something he has been working on, however. He competed in our moot court competition this spring and did fairly well. He has moderated and participated in panels for his student groups. As someone who also took time to warm up to public speaking, I find this to be extremely encouraging.

Nick is also capable of doing meticulous work. This is shown both in the exacting writing he did for his paper as well as his extracurricular activities. Nick is an executive editor of his journal, a position that requires him to be extremely particular about both factual and formatting citation issues. He worked for years for PwC doing high-end accounting and auditing work. He is even an Eagle Scout. All of this speaks to his ability to do the kind of ethical and precise work that is required in legal practice.

Based on my experience teaching Nick in a writing intensive course, I am very happy to recommend him. I have every reason to think that he will be an excellent clerk Please do not hesitate to contact me if there is any other information I can provide.

Respectfully,

Matthew Kugler

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Associate Professor of Law
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NORTHWESTERN PRITZKER SCHOOL OF LAW

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to strongly recommend Nicholas Bottcher for a clerkship in your chambers. Nick was a student in my Communication and Legal Reasoning class during his first year at Northwestern. The CLR classes are small, intensive courses designed to help students develop the analytical, writing, and research skills necessary for successful law practice. The fall semester of CLR focuses on teaching students to evaluate legal problems through a neutral lens; in the spring, we move to advocacy and more sophisticated research. Nick was also a student in my Advanced Legal Writing class this spring.

Nick was an absolute pleasure to have in class, and that was clear from the very beginning. He took an active approach to ensuring he was not only satisfying the requirements of the course but excelling at them. He is one of the rare students who is interested in learning not just what he needs to succeed in the course but what will help him more broadly in his legal education and career.

Nick is such an enjoyable person to work with that I offered him the position of teaching assistant for my Advanced Legal Writing class this spring. I had informed Nick that I planned to focus all the major writing assignments on criminal law, which I knew was an interest of his. However, Nick preferred to take the class as a student. This is characteristic of Nick, to diligently apply himself to ensure that he learns and develops his skills as much as possible, working toward his goal of becoming a trial attorney.

Nick has pursued many opportunities outside of law school to further that goal, including serving as a judicial extern this spring. I have no doubt that he would enjoy serving as a full-time clerk; nor do I have any reservations about recommending him. I am certain he would do an outstanding job and would be an asset to your chambers.

Respectfully,

Rebekah Holman
Clinical Assistant Professor of Law
Northwestern Pritzker School of Law

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U.S. Department of Justice
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Eastern District of New York
271 Cadman Plaza East
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March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Re: Clerkship recommendation for Nicholas Bottcher

Dear Judge Liman:

I write to give Nicholas Bottcher my highest recommendation as you consider him for a clerkship. I am an Assistant United States Attorney in the Eastern District of New York, and Nick interned for me during the summer of 2020. It was a difficult summer for the country, and our Office. As a result, our summer internship program was entirely remote. Despite that challenge, Nick was one of the best interns I have ever had the good fortune to work with. He worked on many complex issues, including preparing multiple memorandums considering factual and legal issues related to loss calculation and restitution in a $2 billion syndicated loan and bond fraud case involving United States and international investors, helped draft a sentencing letter in a complex securities fraud case involving a NASDAQ-traded stock, and prepared a draft brief in connection with a 2255 motion. Nick is smart, hard-working, a team player, and a pleasure to work with. He has excellent legal research skills, and he writes well. Having had the great fortune to have clerked for the late Hon. Peter K. Leisure at the beginning of my legal career, I have a good idea about the qualities that make an excellent law clerk. I think Nick possesses all of those qualities and would be a great addition to your chambers.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

MARK J. LESKO
Acting United States Attorney

By: /s/ Mark E. Bini
Mark E. Bini
Assistant U.S. Attorney
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NICK BOTTCHER

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Writing Sample

This writing sample is a draft opinion written for Judge Franklin Valderrama as an extern in his chambers during Spring 2021. This unedited motion has been used as a writing sample with his permission.

Introduction

Plaintiff Kertray Nichols (Plaintiff) worked at Life Fitness, LLC (Life Fitness) as a Technical Support Supervisor between February 8, 2016 and April 16, 2018. Nichols requested and was granted leave by Life Fitness pursuant to the Family Medical Leave Act (FMLA), 29 U.S.C. § 2612. Following the term of FMLA leave, Life Fitness terminated Nichols' employment on April 16, 2018. Nichols filed a 15-count complaint against Life Fitness and its parent company Brunswick Corp. (Brunswick), (collectively, Defendants), alleging discrimination and retaliation under various federal and Illinois State laws. The relevant counts for the purpose of this Opinion are Counts 2, 5, 7, and 10. In Counts 2 and 7, Nichols alleges that Defendants discriminated against him in violation of the Americans with Disabilities Act (ADA). In Counts 5 and 10, Nichols alleges that Defendants retaliated against him in violation of the "Illinois State Retaliatory Discharge Law." Defendants filed a motion to dismiss Counts 2, 5, 7, and 10, pursuant to Federal Rule of Civil Procedure 12(b)(6) arguing that Nichols has failed to state a claim for ADA discrimination, as well as violation of the "Illinois Retaliatory Discharge Law". R. 29 Mot. Dismiss. For the reasons that follow, the Court grants the motion to dismiss for Counts 2, 5, 7, and 10.

Background

Nichols began working for Life Fitness, a Delaware limited liability company with an office in Illinois, on February 8, 2016 as a Technical Support Supervisor. Compl. ¶ 7. On August 14, 2017, Nichols formally requested FMLA leave from Life Fitness. *Id.* ¶ 8. Defendants approved Nichols' request for FMLA leave for the period October 16, 2017 through April 16, 2018. *Id.* ¶ 9. At the end of his FMLA leave, Defendants terminated Nichols' employment on April 16, 2018. *Id.* ¶¶ 9, 15.

"[A]t all relevant times, Kertray Nichols was a qualified person with a disability, pursuant to 42 U.S. Code § 12102." Compl. ¶ 29. Additionally, Defendants failed to provide Nichols with reasonable accommodations by prohibiting him from attending physical therapy appointments. *Id.* ¶ 30. As a result of missing therapy because of the backlash he received at work, his physical therapy was ultimately terminated. *Id.* ¶ 13. Defendants also put Nichols on probation and gave him poor performance reviews due to his disability. *Id.* ¶ 32. Nichols met the applicable job qualifications and expectations by providing his services in a satisfactory manner. *Id.* ¶ 33. Nichols alleges that he sustained lost earnings, and other damages due to the actions of Defendants. *Id.* ¶ 39.

In response, Nichols filed a multi-count complaint against Defendants. In Counts 2 and 7 Nichols alleges that Defendants discriminated against him in violation of the ADA. Compl. ¶¶ 23–39, 98–114. In Counts 5 and 10, Nichols alleges that Defendants retaliated against him in violation of the "Illinois State Retaliatory Discharge Law." *Id.* ¶¶ 66–80, 141–155. Defendants move to dismiss the Complaint based on failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Mot. Dismiss.

Legal Standard

[Omitted for brevity]

Analysis

Defendants advance several arguments in their motion to dismiss. First, Defendants argue that by failing to allege a specific disability within the Complaint, as well as how this disability substantially limited a major life activity, the Court should dismiss Counts 2 and 7 because Nichols has failed to sufficiently plead an ADA discrimination claim against the Defendants. Mot. Dismiss at 4–5. Next, Defendants argue that the Court should dismiss Counts 5 and 10 since there is no

statute entitled the "Illinois Retaliatory Discharge Law." *Id.* at 5. Alternatively, if Nichols was referring to the Illinois tort of retaliatory discharge, Defendants argue that this cause of action has been limited by Illinois courts to instances where a plaintiff has been terminated in retaliation for filing a claim under the Workers' Compensation Act or reporting illegal or improper conduct. *Id.* at 5–7. Defendants assert that neither of these situations have been alleged by Nichols; therefore, Counts 5 and 10 should be dismissed since they do not represent cognizable claims. *Id.*

In his Response, Nichols contends that Counts 2 and 7, his ADA discrimination claims, have met the notice pleading standard required by this District. R. 38 Pl.'s Resp. at 1–3. Nichols' Response also references additional facts and exhibits regarding his health issues that were not included in the Complaint. These facts indicate that Nichols suffers from a winged scapula because of a tractor-trailer accident in 2014. *Id.* at 1. Nichols continues by stating that a winged scapula is painful and disabling, resulting in a limitation of shoulder elevation, and this injury has "substantially limited [Nichols'] life activities—including his ability to work at a computer for long periods of time." *Id.* at 1, 2. The Response also mentions that "[e]veryone in [Nichols'] department knew about his underlying condition . . . [he] would sit at his desk in pain most days." *Id.* at 2. The Response also included Nichols' medical records and various communications with the EEOC as exhibits. *Id.*, Exhs. 5–8. Separately, Nichols withdrew Counts 5 and 10 in his response to Defendants' motion to dismiss. *Id.* at 6.

Defendants in their Reply ask the Court to disregard the additional facts and exhibits included within Nichols' Response since this would effectively amend the Complaint. R. 42 Defs.' Reply Br. at 2–3.

I. The ADA Claim

Defendants argue that Nichols has not alleged a plausible claim under the ADA since the Complaint does not identify any specific disability suffered, nor does it allege that a disability "substantially limited" a "major life activity." Mot. Dismiss at 4. Nichols responds arguing that he has met the notice pleading standards required in this District. Pl.'s Resp. at 2–4. The Court addresses each argument in turn.

In this Circuit, to state a claim for relief under Title I of the ADA, 42 U.S.C. § 12102(1) a plaintiff must allege facts showing that "(1) he is 'disabled'; (2) he is qualified to perform the essential function of the job either with or without reasonable accommodation; and (3) he suffered an adverse employment action because of his disability." *Gogos v. AMS Mech. Sys., Inc.*, 737 F.3d 1170, 1172 (7th Cir. 2013) (quoting *E.E.O.C. v. Lee's Log Cabin, Inc.*, 546 F.3d 438, 442 (7th Cir. 2008))[1]. The arguments set forth in Defendants' motion to dismiss only challenge the sufficiency of the complaint as it relates to the first prong of an ADA claim; (Mot. Dismiss) therefore, the Court will similarly focus its analysis on whether Nichols has alleged a disability under the ADA.

"The ADA defines 'disability' as '(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such an impairment;[2] or (C) being regarded as having such an impairment . . . .'" *Gogos*, 737 F.3d at 1172 (quoting 42 U.S.C. § 12102(1)). The ADA also defines "'major life activities' as including, but not limited to, 'caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting,

[1]Plaintiff in his Response to the motion to dismiss references *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999) for the elements of an ADA discrimination claim. Pl.'s Resp. at 3. Since the Seventh Circuit later refined the rule statement for an ADA claim, the Court has used the more recent rule statement in its analysis.

[2]The Plaintiff has attached medical records in his response brief to the motion to dismiss; however, the Court disregards these documents based on the analysis in Part II.

bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.'" *Carothers v. Cty. of Cook*, 808 F.3d 1140, 1147 (7th Cir. 2015) (quoting 42 U.S.C. § 12102(2)(A)). "An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." *Richardson v. Chicago Transit Auth.*, 926 F.3d 881, 889 (7th Cir. 2019) (quoting 29 C.F.R. § 1630.2(j)(1)(ii)); *see also* § 1630.2(j)(1)(i) ("'Substantially limits' is not meant to be a demanding standard.").

A. Physical or Mental Impairment

Defendants argue Nichols has not satisfied the pleading requirements for an ADA claim by failing to allege a specific disability nor any facts that his disability substantially limited a major life activity. Mot. Dismiss at 4. Defendants cite two cases from this District to support this assertion.

First, in *Love v. First Transit, Inc.*, the plaintiff alleged that complications from her pregnancy caused her to leave work early, though she returned to work the following day. *Love v. First Transit, Inc.*, No. 16-CV-2208, 2017 WL 1022191, at *1, 6 (N.D. Ill. Mar. 16, 2017). The court dismissed the complaint since the plaintiff did not sufficiently plead facts to show that her disability imposed a "substantial limit" on her "major life activities." *Id.*; *see also* 42 U.S.C. § 12102(1)(A). Nichols attempts to distinguish *Love* from this case saying that the court dismissed the complaint because pregnancy is not a valid disability under the ADA. Pl.'s Resp. at 5. However, he summarizes the holding of *Love* incorrectly. The court cited authority that pregnancy-related complications can qualify as a disability under the ADA, and instead dismissed the case because the plaintiff did not plead sufficient facts to show that her alleged disability imposed a "substantial limit" on her "major life activities." *Love*, 2017 WL 1022191, at *5, 6. Even though

the plaintiff pled that her disability "substantially limit[ed] the major life activities of working, concentrating, and interacting with others", the court did not accept these conclusory pleadings. *See id.* at 6.

Defendant also cites to *Wicik*, to further support its argument. In *Wicik*, the plaintiff did not allege "if or how her 'medical disability, which includes high blood pressure and stress' substantially limits any of her major life activities other than the fact that she once took some time off of work on account of the alleged disability." *Wicik v. Cty. of Cook*, No. 17 C 6856, 2018 WL 1453555, at *5 (N.D. Ill. Mar. 23, 2018). The court noted that this deficiency was sufficient to dismiss the ADA claim. *Id.* Nichols attempts to distinguish *Wicik* saying the plaintiff failed to articulate that her disability was "qualified" under the ADA, (Pl.'s Resp. at 5) but he overlooks the requirements of *Love* and *Wicik* that a complaint must allege sufficient *facts* to show that the alleged health condition qualifies as a disability under the ADA. In his Complaint Nichols pleads that "[he] was a qualified person with a disability, pursuant to 42 U.S. Code § 12102", but does not include any facts showing that a disability substantially limited a major life activity. Compl. ¶ 29.

Nichols' Response then cites to several cases in this District in an attempt to show that conclusory notice pleading is sufficient to survive a motion to dismiss. Each of these cases does not support Nichols' assertion.

First, Nichols cites to the language in Federal Rule of Civil Procedure 8(a)(2) to demonstrate that notice pleading is the standard in this Circuit. Pl.'s Resp. at 2, 3; *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 667 (7th Cir. 2008) (quoting FED. R. CIV. P. 8(a)(2)). However, the Supreme Court in *Twombly* has interpreted Rule 8(a)(2) to require a plaintiff allege "more than labels and conclusions . . . a formulaic recitation of

a cause of action's elements will not do." *Twombly*, 550 U.S. at 545. "*Factual allegations* must be enough to raise a right to relief above a speculative level . . . ." *Id.* (emphasis added). By pleading that he "was a qualified person with a disability, pursuant to 42 U.S. Code § 12102" Nichols has alleged no facts, merely conclusions and formulaic recitations of an ADA cause of action. Compl. ¶ 29.

Nichols then cites *Murison v. Bevan* to support its claim that "[c]onclusory statements are allowed in federal pleadings." Pl.'s Resp. at 3 (citing *Murison v. Bevan*, No. 06 C 7065, 2008 WL 2561108, at *3 (N.D. Ill. June 25, 2008)). Defendants rightly point out that *Murison* does not help Nichols. Defs.' Reply at 6. Although *Murison* does permit conclusory statements in federal pleadings, the court noted that a "bald allegation" of a legal conclusion is not sufficient to survive a motion to dismiss. *See Murison*, 2008 WL 2561108, at *2. *Murison* continues, requiring that a "complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). The complaint in *Murison* alleged that the defendant had been involved in multiple traffic collisions and had incurred tickets for traffic violations prior to the accident involving the plaintiff, including while defendant worked for his employer. *Id.* at 1, 4. In denying the defendants' motion to dismiss, the court found that these factual allegations were sufficient to show willful and wanton entrustment since the employer was aware of the employee's bad driving record and continued to employ him and permit him to drive its vehicles. *Id.* at 4. Unlike in *Murison*, Nichols' complaint fails to plead any facts that support his "bald allegation" that he suffered from a qualified disability under the ADA.

Nichols also cites *Sanders v. City of Chicago*, which states that conclusory pleadings are sufficient for a complaint to survive a motion to dismiss. Pl.'s Resp. at 3 (citing *Sanders v. City of Chicago*, No. 98 C 5838, 2000 WL 198901, at *4 (N.D. Ill. Feb. 15, 2000)). Again, *Sanders*

predates the pleading rules set forth by *Twombly*. Additionally, the facts pled in *Sanders* are distinguishable from this case. There the plaintiff claimed that the defendant discriminated against him based on an alleged disability, emotional stress syndrome. *Id.* at 6. Although the court did not find that emotional stress syndrome falls within the protection of the ADA, it did not need to since the plaintiff pleads that he is "being regarded as having [a physical or mental impairment that substantially limits one or more major life activities]." *Id.* (quoting 42 U.S.C. § 12102(1)(C)). Since the plaintiff alleged that the defendant's doctor diagnosed him with emotional stress syndrome, and the employer reassigned him to another position because of this perceived disability, the court found that he had sufficiently pled his employer regarded him as being disabled. *Id.* Nichols' complaint does not plead any facts regarding his alleged disability, or that Life Fitness regarded him as being disabled under 42 U.S.C. § 12102(1)(C).

Finally, Nichols cites *Andriacchi*, which states that "[c]onclusory statements are sufficient in a complaint as long as they put the defendant on notice of the plaintiff's claim." Pl.'s Resp. at 4 (quoting *Andriacchi v. City of Chicago*, No. 96 C 4378, 1996 WL 685458, at *2 (N.D. Ill. Nov. 22, 1996)). However, *Iqbal* and recent Seventh Circuit authority have clearly indicated that these types of threadbare conclusions are insufficient to survive a motion to dismiss. *See Olson v. Champaign Cty., Ill.*, 784 F.3d 1093, 1099 (7th Cir. 2015); *Iqbal*, 556 U.S. at 678. Regardless, the plaintiff pled a specific disability, drug addiction, within his complaint. *Andriacchi*, 1996 WL 685458, at *2.

The Seventh Circuit has further clarified the requirements for an ADA discrimination claim, stating that complaints are required to allege a specific qualifying disability. "[S]urely a plaintiff alleging discrimination on the basis of an actual disability under 42 U.S.C. § 12102(1)(A) must allege a specific disability." *Tate v. SCR Med. Transp.*, 809 F.3d 343, 345 (7th Cir. 2015).

In his Complaint, Nichols alleges he "was a qualified person with a disability, pursuant to 42 U.S. Code § 12102." Compl. ¶ 29. However, since the Complaint does not allege a specific ailment nor facts to demonstrate how the alleged disability "substantially limits" a "major life activity", the Court has found that Nichols has failed to plead a qualifying disability under 42 U.S.C. § 12102(A).

B. Regarded as Having Such an Impairment

In his Response, Nichols suggests that Defendants were aware of his disability. Pl.'s Resp. at 4. The Court will briefly examine whether Defendants regarded Nichols as having a qualifying disability. Reiterated here, a defendant may allege a disability that substantially limits one or more major life activities under the ADA if he is "regarded as having such an impairment . . . ." *Gogos*, 737 F.3d at 1172 (quoting 42 U.S.C. § 12102(1)(C)). Nichols claims that Defendants acknowledge his disability by referencing and approving Nichols' request for FMLA leave. Pl.'s Resp. at 4. This argument conflates the ADA and FMLA. Having a "serious health condition" as defined in the FMLA does not establish a plaintiff having a "disability" as defined in the ADA. *Scheidt v. Floor Covering Assocs., Inc.*, No. 16-CV-5999, 2018 WL 4679582, at *7 (N.D. Ill. Sept. 28, 2018); *see also Burnett v. LFW Inc.*, 472 F.3d 471, 483 (7th Cir. 2006) ("'Disability' under the ADA and 'serious health condition' under the FMLA are distinct concepts that require different analyses.") (quoting *Rhoads v. F.D.I.C.*, 257 F.3d 373, 387 n. 12 (4th Cir. 2001)). Therefore, Defendants' knowledge of Nichols' FMLA request and leave does not mean that they regarded him as having a qualifying disability under 42 U.S.C. § 12102(1)(C).

Since Nichols has failed to show that he suffered from a specific disability that "substantially limited" a "major life activity" or that his employer regarded him as having such an impairment, his complaint does not satisfy the first element of an ADA discrimination claim.

II. Additional Facts in Plaintiff's Response

Next, the Court will examine whether Nichols may allege additional facts in his response brief to save a deficient complaint. Responding to Defendants' motion to dismiss, Nichols provided further factual detail and attached health records and various communications with the EEOC to support his allegations of having a qualified disability under the ADA. Pl.'s Resp. In their Reply, Defendants argue that the new factual detail and exhibits should be disregarded by the Court since it would allow Nichols to amend his Compliant in a response brief. Defs.' Reply at 2, 3; *see Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 448 (7th Cir. 2011). The Court agrees. "Materials or elaborations in appellants' brief opposing dismissal may be considered, so long as those materials or elaborations are 'consistent with the pleadings.'" *Heng v. Heavner, Beyers & Mihlar, LLC*, 849 F.3d 348, 354 (7th Cir. 2017) (quoting *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012)). The additional facts and exhibits included in Nichols' Response are not consistent with the allegations in the Complaint. Where a complaint is "sparse" for facts, adding facts "consistent" with the complaint would amount to amending the deficient complaint. *Bruno v. Glob. Experience Specialists, Inc.*, No. 19-CV-06710, 2020 WL 5253139, at *3 (N.D. Ill. Sept. 3, 2020). "It is a 'basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss.'" *Id.* (quoting *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 348 (7th Cir. 2012)). In *Mitchell*, the plaintiff attached three exhibits to her response, expanding on her allegations in an attempt to survive a motion to dismiss. *Mitchell v. City of Plano*, No. 16-CV-07227, 2018 WL 3819110, at *9 n. 7 (N.D. Ill. Aug. 10, 2018). The court disregarded the factual allegations included in the exhibits since they would have amounted to amending the complaint through a response brief. *Id.*

Here, since accepting the new factual allegations and exhibits attached to Nichols' Response to the motion to dismiss would constitute amending the complaint, these additional facts and exhibits are disregarded by the Court.

Since Nichols has not satisfied the first element of an ADA discrimination claim, the Court does not need to examine whether the complaint satisfies the remaining elements. *See Cassimy v. Bd. of Educ. of Rockford Pub. Sch., Dist. No. 205*, 461 F.3d 932, 935–36 (7th Cir. 2006).

Conclusion

For the foregoing reasons, the Court grants Defendants' Motion to Dismiss with respect to Counts 2 and 7 without prejudice. Based on Nichols' withdrawal of Counts 5 and 10, the Court also grants Defendants' Motion to Dismiss with respect these counts, dismissing them with prejudice.

Applicant Details

First Name	**Dominic**
Last Name	**Budetti**
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Applicant Education

BA/BS From	**Loyola Marymount University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 19, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Annual Survey of American Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am a recent graduate of New York University School of Law and current Law Clerk at Selendy & Gay PLLC. I write to apply for a position as your law clerk for the 2024-2025 term and any subsequent term for which you are considering applicants. I have enclosed my resume, references, letters of recommendation, law school transcript, undergraduate transcript, and writing sample for your review.

Professors Helen Hershkoff, Deborah Malamud, and Shirley Lin are providing letters of recommendation in support of my application. I worked for Professor Hershkoff as a research assistant, and she advised my student note on the False Claims Act. Professor Malamud taught my first-year course on administrative law and statutory interpretation. Professor Lin was my instructor for NYU's lawyering program, and I served as her teaching assistant. The Honorable Edgardo Ramos, for whom I worked as a judicial extern, is also serving as a reference.

I would greatly appreciate an opportunity to discuss my qualifications further at a time and in a manner that is workable for you in light of the ongoing complications resulting from the COVID-19 pandemic. Thank you for your time and consideration.

Respectfully,

Dominic V. Budetti

DOMINIC V. BUDETTI

491 Columbus Ave. #PHB • New York, New York 10024
949.892.0117 • dominic.budetti@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York
J.D., *cum laude*, May 2021
Honors: Dean's Scholar
Annual Survey of American Law, Articles Editor
Program on Corporate Compliance and Enforcement, Student Fellow
Unofficial GPA: 3.62
Activities: Lawyering Teaching Assistant, Fall 2020-Spring 2021
Supreme Court Forum, Co-President, Fall 2019-Spring 2020
Tutor: Civil Procedure; Legislation and the Regulatory State

LOYOLA MARYMOUNT UNIVERSITY, Los Angeles, California
B.A. in History and Political Science, Minor in Computer Science, *summa cum laude*, May 2018
Senior Thesis: *Relational Equality: Rethinking Political Equality in Light of Citizenship and Liability*
Select Honors: History and Political Science Program Scholar (highest academic achievement)
Honors in Political Science
Activities: Phi Delta Phi Pre-Law Honors Society, LMU Hall, President
LMU Mock Trial, Vice President

EXPERIENCE

SELENDY & GAY PLLC, New York, New York
Law Clerk, Oct. 2021-present; ***3L Law Clerk,*** Aug. 2020-May 2021; ***Summer Associate***, June 2020-Aug. 2020
Work on litigation involving constructive trusts, bankruptcy, student lending, and discretionary parole. Draft research memoranda, briefs, other court filings, and cross examination questions. Engage in argument moots.

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York
Research Assistant to Professor Linda Silberman**,** Dec. 2020-May 2021
Researched, wrote, and edited multiple drafts of a lecture on party autonomy and contractual choice of law clauses.

Research Assistant to Professor Helen Hershkoff, May 2019-Nov. 2019
Updated sections of Volume 14 of Wright & Miller's Federal Practice and Procedure treatise concerning the United States as plaintiff and actions for nonmonetary relief under the Administrative Procedure Act.

Research Assistant to Professor Richard Stewart, Mar. 2019-Sept. 2019
Researched the intersection between legal and political theory and the administrative state.

THE HON. EDGARDO RAMOS, U.S. DISTRICT COURT, S.D.N.Y., New York, New York
Judicial Extern, Sept. 2019-May 2020
Researched and drafted multiple opinions and orders on dispositive motions dealing with a variety of subject matters. Assisted judicial clerks with research, proofreading, and cite checking.

NETWORK LOBBY FOR CATHOLIC SOCIAL JUSTICE, Washington, D.C.
Government Relations Intern, June 2017-Aug. 2017
Lobbied on healthcare and immigration policy with senior staffers in the United States Congress.

PUBLICATIONS

Falsity and Specific Representations Under the False Claims Act (*forthcoming student note*).
*Injunctive Class Actions & Post-*Dukes *Dilemmas in Rule 23(b)(2) Certification* (*forthcoming*).

ADDITIONAL INFORMATION

Enjoy hiking, rereading Tolkien books, reading about astronomy, and working on small programming projects.

DOMINIC V. BUDETTI
491 Columbus Ave. #PHB • New York, New York 10024
949.892.0117 • dominic.budetti@law.nyu.edu

REFERENCES

The Hon. Edgardo Ramos
U.S. District Court, Southern District of New York
(212) 805-0294
Edgardo_Ramos@nysd.uscourts.gov

Professor Linda Silberman
New York University School of Law
(212) 998-6204
linda.silberman@nyu.edu

Professor Helen Hershkoff
New York University School of Law
(212) 998-6285
helen.hershkoff@nyu.edu

Professor Deborah Malamud
New York University School of Law
(917) 414-7471
deborah.malamud@nyu.edu

Professor Shirley Lin
New York University School of Law
(347) 583-8901
slin2@law.pace.edu

Name: **Dominic V Budetti**
Print Date: **07/05/2021**
Student ID: **N13731010**
Institution ID: **002785**
Page: **1 of 2**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/19/2021
School of Law
Honors: cum laude
Major: Law

Fall 2018

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Randy Hertz			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Oscar G Chase			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Richard Rexford Wayne Brooks			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Perspectives on Public Interes			
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2019

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Trevor W Morrison			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Deborah C Malamud			
Torts	LAW-LW 11275	4.0	A-
Instructor: Barry E Adler			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2019

School of Law
Juris Doctor
Major: Law

Evidence	LAW-LW 11607	4.0	B+
Instructor: Daniel J Capra			
Property	LAW-LW 11783	4.0	B+
Instructor: Richard A Epstein			
Federal Judicial Practice Externship	LAW-LW 12448	3.0	CR
Instructor: Michelle Beth Cherande Alison J Nathan			
Federal Judicial Practice Externship Seminar	LAW-LW 12450	2.0	CR
Instructor: Michelle Beth Cherande Alison J Nathan			
Class Actions Seminar	LAW-LW 12721	2.0	A-
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2020

School of Law
Juris Doctor
Major: Law

--
Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Complex Litigation	LAW-LW 10058	4.0	CR
Instructor: Troy A McKenzie			
Constitutional Litigation Seminar	LAW-LW 10202	2.0	CR
Instructor: John G Koeltl			
Directed Research Option A	LAW-LW 10737	2.0	CR
Instructor: Helen Hershkoff			
Business Crime	LAW-LW 11144	4.0	CR
Instructor: Jennifer Hall Arlen			
Antitrust & Regulatory Alternatives I	LAW-LW 11348	3.0	CR
Instructor: Harry First			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	60.0	60.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Conflict of Laws	LAW-LW 10701	4.0	B+
Instructor: Linda J Silberman			
Annual Survey of American Law	LAW-LW 10727	1.0	CR
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Shirley Lin			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Trevor W Morrison			
Religion and the First Amendment	LAW-LW 12135	2.0	A-
Instructor: Schneur Z Rothschild John Sexton			
Ethics in Government: Investigation and Enforcement	LAW-LW 12211	2.0	A
Instructor: Ellen N Biben Linda Lacewell			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	75.0	75.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Survey of Securities Regulation	LAW-LW 10322	4.0	CR
CR/F grade option was available to students in Spring 2021 because of pandemic.			
Instructor: Stephen J Choi			
Torts:Products Liability	LAW-LW 11140	3.0	A
Instructor: Mark A Geistfeld			
Legislation and Political Theory	LAW-LW 11688	3.0	A+
Instructor: John A Ferejohn			
Supreme Court Seminar	LAW-LW 12064	2.0	A
Instructor: Troy A McKenzie Yaira Dubin Sina Kian			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Linda J Silberman			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	88.0	88.0

Unofficial

Name:	**Dominic V Budetti**
Print Date:	**07/05/2021**
Student ID:	**N13731010**
Institution ID:	**002785**
Page:	**2 of 2**

Staff Editor - Annual Survey of American Law 2019-2020
Articles Editor - Annual Survey of American Law 2020-2021
End of School of Law Record

Unofficial

Loyola Marymount University

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Student No: 952930358 Date Issued: 02-FEB-2021
OFFI

Record of: Dominic Vincent Budetti
Current Name: Dominic V. Budetti
49 Nighthawk
Irvine, CA 92604

Issued To: DOMINIC BUDETTI
175 WEST 81ST STREET
5C
NEW YORK, NY 10024-7244

Course Level: Undergraduate
Only Admit: Fall 2014

Current Program
College : Liberal Arts
Major : History
Political Science
Maj/Concentration : Political Science
Minor : Computer Science

Degrees Awarded Bachelor of Arts 05-MAY-2018
Primary Degree
Major : History
Political Science
Maj/Concentration : Political Science
Minor : Computer Science
Inst. Honors: Summa cum Laude

SUBJ	NO.	COURSE TITLE	CRED GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:					
Transfer		AP Credit Equivalencies			
Ehrs: 12.00	GPA-Hrs: 0.00	QPts: 0.00	GPA: 0.00		
INSTITUTION CREDIT:					
Fall 2014					
AMCS	105	History of Ethnic America	3.00 A	12.00	
FFYS	1000	FYS: Imaginative Rationality	3.00 A	12.00	
HIST	198	SS: Heirs of Rome	3.00 A-	11.10	I
MATH	120	Precalculus Math	3.00 B	9.00	
PHIL	198	SS: Philosophical Inquiry	3.00 B	9.00	
Ehrs: 15.00	GPA-Hrs: 15.00	QPts: 53.10	GPA: 3.54		
Dean's List					
Good Standing					
********** CONTINUED ON NEXT COLUMN **********					

SUBJ	NO.	COURSE TITLE	CRED GRD	PTS	R
Institution Information continued:					
Spring 2015					
CMSI	185	Computer Programming	3.00 A	12.00	
HIST	198	SS: Modern Asia Since 1600	3.00 A	12.00	I
HIST	310	History & Historians	3.00 A	12.00	
RHET	1000	Rhetorical Arts	3.00 A	12.00	
THST	198	SS: Comparative Theology	3.00 A	12.00	
Ehrs: 15.00	GPA-Hrs: 15.00	QPts: 60.00	GPA: 4.00		
Dean's List					
Good Standing					
Fall 2015					
CMSI	281	Data Structures	3.00 W	0.00	
CMSI	299	Intro to Javascript Programing	3.00 A	12.00	
HHSC	278	Science, Nutrition, & Health	3.00 A	12.00	
HIST	4134	The Crusades	4.00 A	16.00	
HIST	4215	European Imperialism	4.00 A	16.00	
POLS	1200	U.S. Politics	4.00 A	16.00	
Ehrs: 18.00	GPA-Hrs: 18.00	QPts: 72.00	GPA: 4.00		
Dean's List					
Good Standing					
Spring 2016					
CMSI	186	Programming Lab	3.00 A	12.00	
HIST	3272	Culture/Poltcs Weimar Germany	4.00 A	16.00	
HIST	4010	Pirates and Piracy	4.00 A	16.00	
POLS	1400	Comparative Politics	4.00 A	16.00	
POLS	2000	Foundations Political Theory	4.00 A	16.00	
Ehrs: 19.00	GPA-Hrs: 19.00	QPts: 76.00	GPA: 4.00		
Dean's List					
Good Standing					
Fall 2016					
CMSI	281	Data Structures	3.00 A	12.00	
POLS	2100	Empirical Approaches	4.00 A	16.00	
POLS	3210	Congressional Politics	4.00 A	16.00	
POLS	4210	US Constnl Law: Case Method I	4.00 A-	14.80	
Ehrs: 15.00	GPA-Hrs: 15.00	QPts: 58.80	GPA: 3.92		
Dean's List					
Good Standing					
********** CONTINUED ON PAGE 2 **********					

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Jennifer A. R. Silverman, Ph.D., University Registrar

Loyola Marymount University

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Student No: 952930358 Date Issued: 02-FEB-2021
OFFI

Record of: Dominic Vincent Budetti Page: 2
Level: Undergraduate

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Spring 2017						
CMSI	284	Computer Systems Org	3.00	A	12.00	
CMSI	371	Computer Graphics	3.00	A	12.00	
HIST	3124	Pagans & Saints	4.00	A	16.00	
HIST	4411	The American West	4.00	A	16.00	
POLS	3030	Contemporary Political Theory	4.00	A	16.00	
		Ehrs: 18.00 GPA-Hrs: 18.00 QPts: 72.00 GPA: 4.00				
Dean's List						
Good Standing						
Fall 2017						
HIST	5110	Sem:Law & Society Medvl Europe	4.00	A	16.00	
POLS	3020	Modern Political Theory	4.00	A	16.00	
POLS	3970	Mock Trial I	2.00	A	8.00	
POLS	3999	Congress, Lobbying, and Policy	4.00	A	16.00	
POLS	5800	Honors Seminar	4.00	A	16.00	
		Ehrs: 18.00 GPA-Hrs: 18.00 QPts: 72.00 GPA: 4.00				
Dean's List						
Good Standing						
Spring 2018						
CMSI	375	Game Design	3.00	A	12.00	
POLS	3971	Mock Trial II	2.00	A	8.00	
POLS	4220	US Constnl Law: Case Method II	4.00	A	16.00	
POLS	4800	Political Leadership	4.00	A	16.00	
POLS	5810	Honors Thesis	4.00	A	16.00	
		Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 68.00 GPA: 4.00				
Dean's List						
Good Standing						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	135.00	135.00	531.90	3.94
TOTAL TRANSFER	12.00	0.00	0.00	0.00
OVERALL	147.00	135.00	531.90	3.94

********** END OF TRANSCRIPT **********

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PRINTED COPY PRINTED COPY

This transcript processed and delivered by Credentials' TranscriptsNetwork

Jennifer A. R. Silverman, Ph.D., University Registrar

Office of the Registrar
1 LMU Drive, MS 8325
Los Angeles, CA 90045-2659
(310) 338-2740 * FAX (310) 338-4466
registrar@lmu.edu * http://registrar.lmu.edu

Loyola Marymount University is the successor to St. Vincent's College (1865-1911) which became Loyola College of Los Angeles (1918-1933), and then Loyola University (1933-1973). Marymount Junior College opened in 1933, becoming Marymount College in 1948. In 1968, Loyola University and Marymount College formed an affiliation, each being autonomous. In 1973, Loyola University and Marymount College merged and formed Loyola Marymount University.

Loyola Marymount University is accredited by the Western Senior College and University Commission as a degree-granting institution at the baccalaureate, masters, doctoral, and professional levels.

A record of a student enrolled both before and after Fall 1989 may be composed of two separately formatted transcripts.

This transcript cannot be released to a third party without the written consent of the student. These instructions are in accordance with the Family Educational Rights and Privacy Act of 1974 (FERPA).

UNIVERSITY CALENDAR
The University operates on a semester calendar (Fall and Spring) with 15 weeks of instruction followed by a week of final examinations or the equivalent in accelerated (summer sessions) terms.

TRANSCRIPT ABBREVIATIONS

Cred	Credits (Hours)
Ehrs	Earned Hours
GPA	Grade Point Average (4.00 grading scale)
GRD	Grade
Hrs	Hours (Credits)
No.	Course Number
QPts	Quality (Grade) Points
R	(Column Header): Courses (I)ncluded in or (E)xcluded from GPA calculation
Subj	Subject

ACADEMIC STANDING AND RECOGNITION

"Dean's List" appears in the term in which the academic recognition was received. Latin Honors are cum Laude (3.5); Magna cum Laude (3.7) and Summa cum Laude (3.9) and are awarded to eligible students at Commencement after certification of completion of degree program.

COURSE NUMBERING

Number	Classification
Prior to Fall 1973:	
001-099	Freshmen and Sophomores
100-199	Juniors and Seniors
200-299	Juniors, Seniors and Graduates
300-399	Post-baccalaureate Professional Programs
400-499	Graduates
Since Fall 1973:	
000-099	Non-Degree courses (since 1985)
100-299 & 1000-2999	Lower division undergraduate courses
300-499 & 3000-4999	Upper division undergraduate courses
500-599	Upper division undergraduate courses (graduate students may take for credit)
600-699 & 5000-5999	Graduate courses
7000-7999	Doctoral courses
8000	Non-degree courses

COURSE NUMBERING LMU EXTENSION AND CENTER FOR RELIGION AND SPIRITUALITY

- Course entries marked with the letter "X" at the end of the subject code do not carry degree-granting credit at LMU
- Course entries marked with the letter "Z" at the end of the subject code carry degree-granting credit for Extension degree programs.
- Courses offered in the 800 – 999 and 8000 – 9999 number range are designated for LMU Extension and Center for Religion and Spirituality.
- Credit is reported in the semester credit hour column with each unit representing the equivalent value of 10 to 15 continuing education contact hours.
- Professional development courses marked with the letter "X" that receive a letter grade are considered graduate level courses.

COURSES: INCLUDED OR EXCLUDED FROM GPA
Courses which are explicitly (I)ncluded in or (E)xcluded from the GPA calculation are marked in the R column on the face of the transcript.

GRADING SYSTEM

Grade	Grade Points	Grade	Grade Points
A	4.0	C+	2.3
A-	3.7	C	2.0
B+	3.3	C-	1.7
B	3.0	D	1.0
B-	2.7	F	0.0

The following grades are not used in the GPA calculation:

AT	Attended
AU	Audit
CR	Credit (minimum of a C required for undergraduates; B for graduates*)
I	Incomplete
IP	In Progress
NC	No Credit
NR	Grade Not Submitted
NT	Not Attended
W	Withdrawal

*Spring 2020 (minimum of a C for graduates)

A grade of Incomplete (I) or In Progress (IP) are not official final grades. An I or IP is counted in the attempted credit hours; however, they are not included in the calculation of the GPA or total credit hours earned. If not completed, a course with I or IP changes to a pre-assigned default grade, or to an F or NC, which is then included in the GPA calculation.

TERM COURSE VALUE 1967-1973
Prior to 1967, all credit was granted in semester hours. In September 1967, a term course system was implemented without reference to quarter or semester hours. Each course carried a term course value of 1.00. Conversion from term to semester hours:

Course Number	Classification	Equivalency
001-099	Lower Division	2.70 semester hours
100-299	Upper Division	3.33 semester hours
300-399	Professional	3.00 semester hours
400-499	Graduate	3.00 semester hours

In June 1973, the University returned to a semester hour system.

This Academic Transcript from Loyola Marymount University located in Los Angeles, CA is being provided to you by Credentials Solutions, LLC. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Credentials Solutions, LLC is acting on behalf of Loyola Marymount University in facilitating the delivery of academic transcripts from Loyola Marymount University to other colleges, universities and third parties using the Credentials' TranscriptsNetwork™.

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March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am writing to enthusiastically recommend Dominic Budetti for a clerkship in your chambers. Having clerked for the Honorable Denny Chin of the U.S. Court of Appeals for the Second Circuit, I believe that Dominic's excellent writing skills, work ethic, and character make him an outstanding candidate to assist in the work of your chambers.

I came to know Dominic as a student in my Lawyering class for the 2018-19 academic year. He quickly stood out as at one of the sharpest, most engaged students in the class. The Lawyering Program is a key part of the first-year curriculum at NYU. It is a year-long course in which students study the actual practice of law, looking closely at the interactive, fact-sensitive, and interpretive work that is fundamental to excellent advocacy. Students not only engage in the traditional legal research and writing tasks that most law schools emphasize, but also work collaboratively and practice skills typical of most real-world legal practice. Through simulations, discussions, and critique of their work, our students develop skills in legal research and writing, client interviewing, counseling, negotiation, mediation, and oral advocacy. Because of the relatively small size of the class (29 students) and the frequency of one-on-one interactions, I can offer a well informed perspective on his skills and strengths.

Dominic's writing and research skills are top-notch. All of his briefs and memoranda reflect exacting prose, in-depth research, and comprehensive analysis. He enjoyed the challenges of legal writing, and worked so hard to fine-tune it that his work was consistently within the top three in the class. For his full second year, he externed in the chambers of Judge Edgardo Ramos in the Southern District of New York, further honing his skills through drafting orders and opinions. Because of his keen interest in doctrinal theory, I encouraged him to engage with legal scholarship. To that end, he has served as a research assistant to Professors Helen Hershkoff and Richard Stewart.

Dominic's excellent skills and preparation apply equally to his client advocacy and public speaking. In line with seeking out opportunities to round out his abilities as an advisor and litigator, he and a classmate were the only students to volunteer to conduct a post-interview client counseling session. Evaluating his portion of this "fishbowl"-style session in class, Dominic demonstrated to a live client genuine empathy and extensive preparation in addressing her concerns. To do so, he researched additional material on remedies and retaliation outside the course's already intensive baseline assignment regarding summary judgment. He has excellent interpersonal communication skills and enjoys collaborating with others. For example, during oral argument in the Spring his volunteer judge, a law partner, was so impressed that in post-argument feedback that he praised Dominic's potential as a litigator. But what was even more rare was that Dominic extended a professional courtesy to his opposing counsel in connection with the argument that speaks to his deep sense of ethics and collegiality. Due to the lack of personal upside in his assistance, no other students in that situation had done so. This approach was typical of his active participation in class throughout the year. I have no doubt that Dominic will be a terrific associate at Selendy & Gay LLP.

Dominic was also able to effortlessly juggle several extracurricular activities. In addition to his extended (non-credit) judicial externship, Dominic was a Staff Editor for the NYU Annual Survey of American Law and was Co-President of the Supreme Court Forum, which hosts several popular seminar-style events around seminal questions presented in current cases. He thoughtfully pursued his interests around complicated questions of public policy, scholarship, and litigation in his coursework, and developed a note related to his interest in civil procedure and the False Claims Act under Professor Hershkoff.

I am confident that Dominic would be a wonderful clerk. I recommend him unreservedly. If you have any questions or require any additional information, please do not hesitate to contact me at (347) 583-8901 or slin@law.pace.edu.

Very truly yours,

Shirley Lin
Former Acting Assistant Professor
Lawyering Program
NYU School of Law

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 308C
New York, NY 10012-1099

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-director, Arthur Garfield Hays Civil Liberties Program

Telephone: (212) 998-6285
Fax: (212) 995-4760
Email: helen.hershkoff@nyu.edu

January 19, 2022

Dear Judge,

I am writing to recommend Dominic Budetti, NYU Law 2021 *cum laude*, for a judicial clerkship with you. Dominic currently is working at Selendy & Gay in New York. He entered NYU Law as a Dean's Scholar, an honor reserved for a small number of admitted students. I met Dominic in his 1L year, when he chose to participate in my ungraded Reading Group, and during 1L summer he worked with me as a part-time Research Assistant. During 2L and 3L I supervised his Directed Research project, on a topic that grew out of his research with me pertaining to the False Claims Act. Because of the pandemic, his grade for the Directed Research project is recorded as a Credit, but I emphasize it warranted an A.

What has most impressed me about Dominic in all of these different contexts is his extraordinary enthusiasm for the law in its doctrinal, theoretical, and practical aspects. As a student, he actively sought out opportunities where he could learn and engage, and his energy and curiosity were among his hallmark qualities. I found his research and writing skills to be excellent, and his work-product was consistently at a high level. Dominic also is collegial, reliable, and delightful as a person. I believe he would be an excellent judicial clerk and recommend him with warm enthusiasm.

As a summer Research Assistant, Dominic worked part-time (he also worked with Professor Richard Stewart) to prepare annual supplementation to Volume 14 of Wright & Miller's Federal Practice and Procedure. Among a talented group of students, his work was exemplary. His assignment concerned the doctrines and statutes pertaining to the United States as a plaintiff, and to actions for nonmonetary relief under the Administrative Procedure Act. To be sure, the 1L curriculum had introduced Dominic to the APA, but the materials on the United States as a plaintiff—the principle of sovereign immunity, exceptional applications of the creation of federal common law, idiosyncratic interpretative canons, and specialized statutes permitting the government to sue on behalf of individuals, and for individuals to sue in the name of the government—were far beyond the concepts taught in the first year. Dominic showed himself to be quick, intelligent, and resourceful, and he easily brought himself up to speed in his ability to research the law and to make sound judgments about case selection.

As an example of Dominic's deep interest in law, he served during 2L as a judicial intern to the Hon. Edgardo Ramos, of the Southern District of New York, working about 20 hours a week inside and outside chambers (during the pandemic, the work became entirely remote). Participating in the internship was not in itself unusual; what was unusual is the fact that Dominic began this position in Fall 2019 as part of a for-credit clinic course, but then elected to continue without credit for the rest of the academic year. The internship involved researching and drafting legal opinions on substantive motions dealing with a variety of subject matters, including contracts, torts, habeas petitions, and federal procedure, as well as assisting the Judge's clerks through proofreading, cite checking, and additional research. I asked Dominic why he stayed, and I recite his answer: "I joined the program intending to learn a lot and work on my legal research and writing, but what really led me to stay were the people I was working with and the fact that going into chambers was always the highlight of my week." In particular, a clerk would assign a case to Dominic and Dominic became responsible for that case from that point forward until the opinion was signed and issued. He also attended a good number of conferences and sentencings, and watched portions of two trials over which Judge Ramos presided. I imagine this experience provided excellent training for a post-graduate judicial clerkship.

Dominic also was an active member of the NYU Law community. In particular, he served as Co-President of the Supreme Court Forum, which hosted small, seminar-style events throughout the year bringing together students and professors to talk about recent or upcoming Supreme Court cases. Dominic told me that the organization caught his attention when he first visited NYU as an admitted student, and that he valued the intense intellectual discussion that the format encouraged. Initially he played only a small role in the organization, but then stepped forward to serve on the Board and to expand the Forum's activities.

Dominic's decision to write about the False Claims Act reveals a great deal about the quality of his mind, his analytic acuity, and his engagement with law. The Note focuses on the standard for pleading a particular theory of liability—implied false certification. In the wake of the Supreme Court's acceptance of this theory of liability in 2016, lower courts have divided in their approach to the sufficiency of allegations involving materiality, falsity, and scienter, all of which one assumes are essential elements of establishing liability. Dominic's Note offers an approach that balances the complex and competing interests of the multiple stakeholders involved in lawsuits enforcing the act, and explains why the statute is an important regulatory tool. I believe the paper makes a serious contribution to the literature and hope that Dominic will be able to find a publication home for it.

I also stress Dominic's maturity and good sense. Dominic came to Law School directly from college, but as an undergraduate he worked and undertook extra-curricular activities that, to my mind, amply prepared him for professional life. He worked with Classroom Support to help pay tuition (essentially making sure classroom technology worked smoothly); participated in and then served as Vice President of Mock Trial; and interned

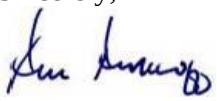
with NETWORK Lobby in Washington, D.C., focusing on such issues as healthcare and immigration policy.

Dominic's career plan is a traditional one: to work as a litigator in a law firm and to become a partner, and possibly to transition to a U.S. Attorney's office at different times in his career. But he is sensible enough to know that law firm practice is changing and that he needs to be alert to the profession's challenges and opportunities. I have strong confidence that because of his intelligence, dedication, and exemplary skill set, Dominic will be a standout member of the Bar, and an exemplary judicial clerk.

I recommend him without reservation.

Thank you very much for our consideration.

Sincerely,



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Deborah C. Malamud
AnBryce Professor of Law Emerita

January 18, 2022

RE: Dominic Budetti

Dear Judge:

It is my great pleasure to recommend Dominic Budetti for a clerkship in your chambers.

Dominic was a student in my first-year course on Legislation and the Regulatory State ("LRS") (a hybrid of statutory interpretation, administrative law, and separation of powers), and he was one of my favorite students throughout the course (culminating in a fabulous A exam). Dominic relished the political-science dimensions of the course as much as he did the doctrinal ones, and both in classroom participation and in office hours, was a source of energy and ideas throughout the semester. On the strength of his superb performance, I asked Dominic to serve as a teaching assistant for me the next time I was scheduled to teach Legislation and the Regulatory State, which would have been Spring 2021. I have recently retired effective December 31, 2020, and am sorry to have denied Dominic the well-earned opportunity to serve in that role.

I am a graduate of the University of Chicago Law School, and there are many (delightful) ways in which Dominic reminds me of what was best about the Chicago students of my day. He is intensely interested in law (for what it is, not just for what one can do with it). He is committed to evaluating legal arguments on their merits, with critiques articulated in legally-sophisticated and politically-neutral terms. I went through an entire semester enjoying Dominic's comments without knowing the first thing about his own political orientation. He has selected courses and externship opportunities that are consistent with the desire to master the craft of litigation. Perhaps one of the reasons that he did so well in my LRS course is that I have retained a good degree of my Chicago-ness: I was taught (by Edward Levi and so many others) to approach the law with the aspiration that it be a craft, worthy of mastery. Of all the students I've taught at NYU, Dominic's approach to his legal studies is the most like the approach I was taught to value so long ago.

Beyond being what I lovingly call a "law geek" (lovingly because I am one), Dominic is both a "procedure geek" and an "appellate geek." Dominic dedicated himself

wholeheartedly to his Fall 2019 district court externship with Judge Edgardo Ramos, continuing to work in chambers (in person and then remotely) for no academic credit through the spring semester. He has already taken two advanced civil procedure courses, and he served as a research assistant to Prof. Helen Hershkoff on a range of procedural issues. On the appellate front, Dominic served on the Board of our Supreme Court Forum, which hosts small, seminar-style events at which faculty and students are invited to analyze recent or upcoming Supreme Court cases. His favorite course thus far in law school has been Judge Koeltl's seminar on Constitutional Litigation, in which students argue cases from the Supreme Court's current docket. In an ideal world, Dominic would serve as a clerk in both a district court and an appellate court, and he would bring great enthusiasm to both.

Dominic is quite young – he came to law school straight from college – but he is very mature in the way he thinks about his career. He has accepted a position at Selendy & Gay, a young litigation firm created by 10 Quinn Emanuel attorneys about two years ago. Some of my most interesting litigation-bound students have embraced smaller boutique firms (in fact, one is the co-founder of one), but very few of them have done so at such an early stage of their careers. Perhaps here, too, Dominic is a bit old-fashioned. He is looking for a firm he would want to stay at long-term, rather than choosing a firm as a launching platform (and reputational signal) for some future job. I think that for Dominic, this decision is precisely right. He will thrive as a litigator, and he should work in a firm in which he can develop intense working relationships with a small cohort of similarly-committed colleagues.

I think it should be clear that the strengths I see in Dominic are ones that are perfectly suited to the environment of a judicial clerkship. I could not be more confident of Dominic as a candidate. I hope you will take the opportunity to meet him.

I can be reached by cellphone at 917-414-7471, or by email at deborah.malamud@nyu.edu.

Sincerely,

Deborah C. Malamud
AnBryce Professor of Law Emerita

DOMINIC V. BUDETTI
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The attached writing sample is the draft of a piece I have submitted for publication with the Annual Survey of American Law's online forum. The research and writing is entirely my own, and I have received no comments or edits on this draft.

INJUNCTIVE CLASS ACTIONS & POST-*DUKES* DILEMMAS IN RULE 23(b)(2) CERTIFICATION

Dominic V. Budetti

In 1962, when a newly appointed Advisory Committee began working on revisions to Federal Rule of Civil Procedure 23—the rule governing class actions—they were driven by two banner motivations. First, because of the general confusion surrounding the 1938 version of the rule and its consequent disuse,[1] the committee placed efficiency, utility, and functionalism amongst their primary focuses.[2] Second, because of post-*Brown v. Board of Education*[3] uncertainty about the enforceability of injunctions ordered in non-aggregate cases as against similarly situated individuals or entities not formally joined to the action, the committee felt that a workable class action rule was necessary for both the successful implementation of the desegregation decrees and the effectiveness of class actions in an "undefined but anticipated range of civil rights cases."[4]

What emerged in 1966, after years of debating, drafting, and politicking,[5] was a procedural device that could fulfill both needs: Rule 23(b)(2), which outlined the injunctive class action, permitted class-wide relief when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or

[1] For a description of the issues with the original Rule 23, see FED. R. CIV. P. 23 advisory committee's note to 1966 amendment, 39 F.R.D. 69, 98 [hereinafter *Committee Note*]; Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551, 570-76 (1937); Chafee, *Some Problems of Equity* 245-46, 256-57 (1950).

[2] *See* Samuel Issacharoff, *An Oral History of Rule 23: An Interview with Professor Arthur Miller*, 74 N.Y.U. ANN. SURV. AM. L. 105, 107 (2018); Arthur Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1, 4–5 (2018).

[3] 347 U.S. 483 (1954).

[4] *See* Miller, *supra* note 2, at 5 (citing David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011)). The Supreme Court has also recognized the inextricable link between public interest litigation and the revised Rule 23(b)(2), noting that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of the classes envisioned for (b)(2) treatment. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

[5] For a more detailed chronical of the drafting process, see Issacharoff, *supra* note 2.

corresponding declaratory relief with respect to the class as a whole."[6] By so providing, the Rule and the Committee that drafted it gave consumers, public interest plaintiffs, and other litigants a tool that quickly became a "natural and frequently employed procedural vehicle for pressing policy issues of every kind."[7]

In recent years, however, courts have constrained the utility of Rule 23(b)(2) for a wide range of putative injunctive classes. As the title of this paper suggests, the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* served as the major catalyst for these developments by formally adopting an "indivisibility" standard for the purposes of determining what forms of relief are available to classes seeking certification under Rule 23(b)(2).[8] Under that approach, putative (b)(2) classes must seek redress for conduct "that . . . can be enjoined or declared unlawful only as to all of the class members or as to none of them."[9] While the most immediate consequence of the decision was a wholesale bar on backpay and, in many instances, other claims for monetary relief in (b)(2) actions,[10] the aim of this paper is not to assess the extent to which various forms of monetary relief remain available to putative (b)(2) classes. Rather, this paper is principally concerned with the way in which lower courts have employed the language and reasoning of *Dukes*

[6] FED. R. CIV. P. 23(b)(2) (1966). In its current form, which is substantively identical to the 1966 version, the provision reads as follows: "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).
[7] Miller, *supra* note 2, at 9–10.
[8] 564 U.S. 338, 360 (2011) ("[T]he key to the (b)(2) class is the *indivisible nature* of the injunctive or declaratory remedy warranted . . . ." (internal quotation marks omitted)).
[9] *Id.*
[10] 564 U.S. 338 (2011). *Dukes* thus eliminated a remedy that was, at least in some circuits, previously available to (b)(2) classes. *See, e.g.*, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001) (permitting monetary relief in (b)(2) actions when justified under balancing inquiry, a reasonable plaintiff would have brought the suit to obtain injunctive or declaratory relief even in the absence of possible monetary recovery, and the nonmonetary relief was "reasonably necessary and appropriate were the plaintiffs to succeed on the merits"); Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003) (permitting monetary relief in (b)(2) actions when justifiable based on the plaintiffs' intent in bringing the action).

to limit the certifiability of injunctive class actions—(b)(2) classes that seek *only* injunctive or declaratory relief.

To that end, this paper catalogues four developments in lower court decisions that demonstrate the constriction of Rule 23(b)(2)'s scope through a narrow construction and stringent application of the indivisibility standard. The first of those developments—centered largely around the interplay between indivisibility and Rule 23(a)(4)'s requirement of adequate representation—threatens (b)(2) certification whenever monetary remedies are theoretically available to, but not selected by the class. The remaining three developments all stem from the Supreme Court's imposition of a single injunction requirement,[11] which some courts have interpreted to bar (b)(2) certification where: (1) the class seeks to use multiple injunctions to remedy injuries stemming from a single, overarching source; (2) the class seeks a single injunction that would require subsequent individualized inquiries; and (3) the class seeks a single injunction that would provide final but not mutually beneficial relief to each class member (i.e., where not every member of the class stands to meaningfully benefit from the relief sought).

In assessing each of those trends, this paper also engages with their broader consequences for the utility of the (b)(2) class and suggests that the recent developments described herein run against the rule's central aims. In response, the paper periodically sketches means of mitigating the consequences of those developments via strategic pleading in receptive courts. Given the inherent limitations in those procedural stopgap measures, however, further developments along the current trajectory may considerably limit the degree to which Rule 23(b)(2) remains a "usable vehicle"[12] for seeking broad relief from a variety of social ills.

[11] *See Dukes*, 564 U.S. at 360 (noting that Rule 23(b)(2) "applies only when a *single* injunction or declaratory judgment would provide relief to *each member* of the class" (emphases added)).
[12] Issacharoff, *supra* note 2, at 109.

I. The Intersection of Indivisibility & Adequate Representation

Following the Supreme Court's decision in *Dukes*, "the key to the (b)(2) class [became] the *indivisible nature* of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."[13] In adopting that approach, the Court expressed concern that strategic plaintiffs seeking to avoid certification issues may attempt to willingly exclude valid claims for monetary relief and thereby jeopardize the legal interests of class members with no ability to opt-out.[14] In the post-*Dukes* landscape, this concern has the potential to transform indivisibility into an effective bar on class treatment for an entire category of suits whenever monetary relief is theoretically available to some subset of the class.

An early post-*Dukes* case out of the Eastern District of Louisiana demonstrates how that development could play out. In *Baricuatro v. Industrial Personnel & Management Services, Inc.*, a plaintiff class sought injunctive and declaratory relief for alleged statutory violations of the Trafficking Victims Protection Act ("TVPA") and Racketeer Influenced and Corrupt Organization Act ("RICO") based on claims that the plaintiffs were fraudulently recruited from the Philippines, given visas, and then brought to the United States where they were exploited and forced to live and work in abhorrent conditions.[15] Critically, in seeking to certify a (b)(2) class, the plaintiffs attempted to reserve their individualized claims for backpay damages for treatment during a later "Phase II damages proceeding."[16]

[13] 564 U.S. at 360 (emphasis added) (internal quotation marks omitted).
[14] *Id.* at 364.
[15] No. 11-2777, 2013 WL 6072702 (E.D. La. Nov. 18, 2013).
[16] *Id.* at *20.

As the court explained, however, there was considerable doubt about whether injunctive relief was authorized under either statute, while monetary relief plainly was.[17] Given the apparent disconnect between the injunctive relief sought by the plaintiffs and the relief commonly provided by the statutes, the court suspected that the lead plaintiffs had interests in conflict with those of the absent class members. Specifically, they were concerned that the lead plaintiffs had "attempted to navigate around" *Dukes*' bar on individualized monetary relief by seeking only declaratory and injunctive relief for the class.[18] And while they purportedly preserved their own non-class RICO and TVPA damages claims, they failed to expressly do so for the claims of absentee class members, raising further concerns.[19] The court ultimately refused to certify the class, in part because the failure to include the available forms of monetary relief with perceived disregard of the absentee members' interests ran afoul of Rule 23(a)(4)'s requirement of adequate representation.[20]

It is not insignificant that the plaintiffs in *Baricuatro* had attempted to retain their own damages claims while apparently forfeiting those of the absentee class members. But the core reasoning of the case is by no means confined to that context. It is easy to see how courts could use the logic employed in *Baricuatro* to turn *Dukes*' bar on individualized relief into a bar on (b)(2) treatment of any class that could theoretically seek monetary relief but chose not to do so given the inherent indivisibility issues associated with doing so.[21] What's more, *Baricuatro* is hardly the

[17] *Id.* at *20.
[18] *Id.* at *19 (internal citations and quotation marks omitted).
[19] *Id.*
[20] *Id.* (citing McClain v. Lufkin Indus., Inc., 519 F.3d 264, 283 (5th Cir. 2008)). At base, adequacy requires that the "class representative . . . be part of the class and possess the same interest and suffer the same injury as the class members," and representatives must serve the interests of the class as a whole as well as the specific interests of the subclass that they represent, if subclassing is involved. Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 625–27 (1997).
[21] A similar outcome may result in some lower courts purely because of a narrow construction of the indivisibility standard. Describing the concept as "end-point indivisibility," recent scholarship points to a "push for an overly restrictive interpretation of Rule 23(b)(2)" that would treat indivisibility not as a requirement that "an alleged injury . . . can be remedied on a class-wide basis by an injunction," but as one that limits (b)(2) to "injuries that can only be remedied by a class-wide injunction." Maureen Carrol, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59, 65 (2019) (emphasis added). Pushing back against that construction, the piece suggests an alternative—"root-

first case in which courts have raised this concern. Rather, courts have long recognized that a lead plaintiff's decision to forego monetary relief in order to obtain certification of an injunctive class may well raise adequacy issues.[22] As one court explained:

> The attempt to force a lawsuit into compliance with one of the subparts of Rule 23(b) . . . does not provide a class advocate the license to disregard the requirements of Rule 23(a), including the requirement that the named plaintiff adequately represent the interests of the class. When maximizing the requested relief within the confines of Rule 23(b)(2) runs afoul of that Rule 23(a) requirement by placing the proposed representatives' interests in an antagonistic position vis-a-vis those of the putative class, certification becomes improper.[23]

After *Dukes*, however, class counsel must make new strategic decisions about the structure of the relief sought by a (b)(2) class, as the inclusion of certain previously available remedies, particularly incidental monetary relief, may now raise indivisibility issues under a (b)(2) inquiry.[24] The possibility that courts will not give adequate weight to those considerations—that they will take the position that class counsel cannot attempt to "navigate around" *Dukes* issues through strategic pleading[25]—makes the adequacy issue more threatening to the utility of injunctive class

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cause indivisibility"—which amounts to a "requirement that the challenged conduct could not be lawful as to one class member and unlawful as to others." *Id.* at 66.

[22] *See, e.g.*, Cooper v. Southern Co., 390 F.3d 695, 721 (11th Cir. 2004) ("T]o the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief . . . , it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members . . . [for whom] monetary damages . . . might be of far greater significance . . . ."), *overruled on other grounds by* Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006); Jenkins v. BellSouth Corp., No. 02 Civ. 1057 (VEH), 2007 WL 9711638, at *4 (N.D. Ala. Mar. 5, 2007) (noting the potential for adequacy issues where some class members "may disagree with the decision to forgo any claim for compensatory damages in an effort to achieve class certification"); Guadiana v. State Farm Fire & Cas. Co., No. 07 Civ. 326, 2009 WL 6325542, at *6 (D. Ariz. Dec. 18, 2009) ("Some courts have found that representation is not adequate where the class representative disclaims certain causes of action sometimes in a less than transparent attempt to salvage a class action where the differences between class members is apparent."), report and recommendation adopted, No. 07-326-TUC-FRZ, 2010 WL 1335626 (D. Ariz. Mar. 31, 2010)

[23] Cody v. Gold Kist, Inc., No. 03 Civ. 0745 (RWS), 2005 WL 8155533, at *10 (N.D. Ga. June 13, 2005).

[24] Incidental monetary relief has long been described as monetary relief that would "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 425 (5th Cir. 1998). That understanding was adopted by a number of circuit courts pre-*Dukes*, *see, e.g.*, Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001); Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 646–51 (6th Cir. 2006), and was implicitly endorsed by the Supreme Court in *Dukes*, 564 U.S. 338, 365–66 (2011) (citing *Allison*, 151 F.3d at 415).

[25] Baricuatro v. Industrial Personnel & Management Services, Inc., No. 11-2777, 2013 WL 6072702, at *19 (E.D. La. Nov. 18, 2013).

actions than it would have been before *Dukes*. The significance of these developments for putative (b)(2) classes may, therefore, turn on how courts credit those strategic decisions.

As of now, there is not a prevailing standard on this issue. On the one hand, at least some courts have noted (albeit in different contexts) that the "strategic decision to pursue those claims a plaintiff believes to be most viable," to the exclusion of others, "does not render her inadequate as a class representative."[26] Taking a more skeptical position, another court wrote that while "[t]he class representatives willingness to forego a claim that would preclude certification is not per se invalid," it "does create serious concerns for the rights of the plaintiff class."[27] More recently, the Fifth Circuit eschewed any bright line position on the matter and instead established a balancing test, under which courts "deciding whether a class representative's decision to forego certain claims defeats adequacy" must consider "(1) the risk that unnamed class members will forfeit their right to pursue the waived claim in future litigation, (2) the value of the waived claim, and (3) the strategic value of the waiver, which can include the value of proceeding as a class (if the waiver is key to certification)."[28] Although case law applying the Fifth Circuit's framework remains slim,[29] it appears to be a relatively class-friendly approach. Most notably, the assurance that courts will consider strategic concerns provides a level of certainty for class counsel and mitigates the risk

[26] Todd v. Tempur-Sealy Int'l, Inc., No. 13 Civ. 4984 (JST), 2016 WL 5746364, at *5 (N.D. Cal. Sept. 30, 2016); *see also* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 953 (7th Cir. 2006) (weighing the value of the purportedly waived claim against the value of proceeding as a class on the un-waived claims).
[27] David v. Signal Int'l, LLC, No. 08 Civ. 1220, 2012 WL 10759668, at *34 (E.D. La. Jan. 4, 2012).
[28] Slade v. Progressive Sec. Ins. Co., 856 F.3d 408, 412–13 (5th Cir. 2017).
[29] *See* Valentine v. Collier, No. 4:20-CV-1115, 2020 WL 3491999 (S.D. Tex. June 27, 2020); *In re* AXA Equitable Life Insurance Co. COI Litigation, No. 16 Civ. 740 (JMF), 2020 WL 4694172, at *6–7 (S.D.N.Y. Aug. 13, 2020); Henceroth v. Chesapeake Exploration, L.L.C., No. 15 Civ. 2591 (BYP), 2018 WL 1453547, at *6–7 (N.D. Ohio Mar. 23, 2018); Andren v. Alere, Inc., No. 16 Civ. 1255 (GPC) (AGS), 2017 WL 6509550, at *12 (S.D. Cal. Dec. 20, 2017); Goldstein v. ExxonMobil Corp., No. CV 17-2477 DSF (SKx), 2019 WL 7165919, at *5 (C.D. Cal. Oct. 15, 2019). *But see* Schmitt v. Younique LLC, No. SACV 17-1397 JVS (JDEx), 2019 WL 1431906, at *6 (C.D. Cal. Jan. 10, 2019) (declining to adopt the Fifth Circuit's approach absent guidance from the Ninth Circuit).

that class action-adverse judges will resist making any such considerations.[30] Moreover, the opportunity to weigh the "value of the waived claim" may permit further consideration of counsel's strategic decisions by allowing—although not requiring—courts to discount the value of claims that would not be certifiable on a classwide basis and are unlikely to be litigated on an individual basis given the prohibitive costs associated with doing so.

This approach is by no means flawless; it does not, for example, eliminate the risk that courts may simply downplay the strategic value behind the exclusion of certain remedies when balancing the third factor. Without this sort of framework, however, even a partial proliferation of the *Baricuatro* reasoning could quickly place putative class counsel in a bind for which there is no consistent solution. How does one determine when certain monetary claims, which are seemingly no longer to the benefit of the class given the hurdle posed by indivisibility, must nonetheless be included in order to satisfy the adequacy requirement? Conversely, at what point does the inclusion of those claims in a (b)(2) action itself jeopardize adequate representation given the risk that they could undermine certifiability after *Dukes*?

Absent a clear and predictable answer to those questions, putative (b)(2) classes may struggle and increasingly fail to satisfy both *Dukes* and Rule 23(a)(4), and the utility of the (b)(2) class could steadily decline, particularly where statutory damages that involve individualized determinations would otherwise be available to the class members if they were to proceed on their own. Alternatively, class counsel may be incentivized to craft broad classes seeking multiple forms of relief under both Rule 23(b)(2) and (3), even with the knowledge that most of the claims sought under the latter will likely be trimmed at the certification stage, simply to avoid the specter of

[30] This would be particularly true if the framework were applied by those courts that have previously employed the adequacy requirement to channel their skepticism of class counsel and representatives. *See, e.g.*, *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748 (7th Cir. 2011); *In re* Subway Footlong Sandwich Mktg. & Sales Prac. Litig., 869 F.3d 551 (7th Cir. 2017).

inadequate representation that could result from the voluntary exclusion of those claims. Such a development would, of course, add to the cumbersome nature of class litigation and run contrary to the efficiency rationale embodied by Rule 23.

Other procedural devices within Rule 23 itself may provide a partial solution to this development. Namely, Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[31] Numerous courts have held that *Dukes* does not prevent certification of a (b)(2) issue class for the purpose of determining liability, even where the class ultimately seeks individual or non-incidental monetary relief ordinarily barred from (b)(2) certification under *Dukes*, so long as there is a sufficient basis for bifurcating the proceeding into liability and damages phases.[32] As a result, courts can effectively allow classes to resolve liability issues under (b)(2) by foregoing class treatment of individualized monetary claims without raising concerns about conflicting interests, thus strengthening the utility of the (b)(2) class and avoiding the adequacy issue illustrated by *Baricuatro*, all while staying within the bounds of *Dukes*.

Reliance on Rule 23(c)(4), however, is hardly a comprehensive solution to the issues described above given that considerable drawbacks may accompany bifurcated class actions. As the size of the class and the complexity of the issues relating to damages increase, for example, so too does the likelihood that the individual processes required for determining damages will effectively nullify, if not outweigh, whatever efficiency gains are provided by the initial class treatment. This is particularly true where the court or other adjudicative body in the follow-on procedure is required to determine whether a given "aggregate proceeding confined to particular

[31] FED. R. CIV. P. 23(c)(4).
[32] *See*, *e.g.*, Easterling v. Conn. Dept. of Correction, 278 F.R.D. 41 (D. Conn. 2011); United States v. City of New York, 276 F.R.D. 22 (E.D.N.Y. 2011); Houser v. Pritzker, 28 F. Supp. 3d 222 (S.D.N.Y. 2014); Little v. Washington Metropolitan Area Transit Authority, 249 F. Supp. 3d 394 (D.D.C. 2017).

issues stands to yield only issue preclusion with respect to the issues encompassed" or instead resolved a "common liability issue that, in turn, . . . preclude[s] the pursuit of divisible remedies" in the later actions.[33]

Moreover, bifurcation remains an unreliable solution for litigants: As a discretionary procedure, its availability is dependent upon the willingness of the court to employ it. As district and circuit courts take differing views on when and how they will do so, the utility of Rule 23(b)(2) in any given instance may come to depend on where the case is brought, encouraging forum shopping and giving way to the sort of inconsistent application of Rule 23 that the 1966 amendments, and subsequent amendments, sought to resolve.[34] And for putative classes relegated to courts that do not view issue classes favorably, a bar on injunctive class actions where a class-wide injunction and corresponding declaratory relief are not the only remedies *available* to the class members will likely produce results that run contrary to the well-recognized proposition that "aggregate treatment of common issues concerning indivisible remedies is permissible even though divisible remedies are also available . . . ."[35] Thus, the problems created by the intersection of indivisibility and adequacy, for which the existing procedural solutions are inadequate, may ultimately limit the effective scope of Rule 23(b)(2) while further complicating the certification process for those putative classes that can still rely on the provision.

[33] Principles of the Law of Aggregate Litigation § 2.04 cmt. a (AM. LAW INST. 2009).
[34] *Cf. Committee Note*, 39 F.R.D. at 98 (describing the difficulties that accompanied application of Rule 23's original "obscure and uncertain" provisions); *see also* S. Rep. No. 109-14, at 23 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 23 (noting that concerns about forum shopping motivated the passage of the Class Action Fairness Act of 2005).
[35] Principles of the Law of Aggregate Litigation § 2.04 cmt. a (AM. LAW INST. 2009).

II. Structuring Injunctive Relief

In addition to the issues described above, which concern the broader consequences of the indivisibility standard in light of Rule 23's other requirements, further complications arise from the language employed by the Court when adopting that standard. Notably, while the Court's holding on the (b)(2) issue in *Dukes* was, by its terms, confined to the propriety of monetary damages,[36] the Court did not so limit the scope of the rule that it promulgated. Instead, the Court explicitly extended the new indivisibility standard beyond the question of monetary relief, noting that class actions under Rule 23(b)(2) are available "only when a single injunction or declaratory judgment would provide relief to each member of the class."[37] In 2018, the Court decided *Jennings v. Rodriguez*—its only post-*Dukes* decision to date addressing the issue of (b)(2) relief—and confirmed what the dicta in *Dukes* had suggested: that indivisibility, in the absence of claims for monetary or other incidental relief, effectively operates as a single injunction requirement.[38] Relying on that reasoning, courts have employed *Dukes* to further narrow the operative scope of Rule 23(b)(2) by limiting both the form of permissible injunctive relief as well as the range of putative classes entitled thereto, often in ways that undermine the central purposes of injunctive class actions and threaten their utility in a variety of contexts.

A. Multiple Injunctions

The most obvious effect of *Dukes*' statement regarding the need for a "single injunction" is that putative (b)(2) classes may not resolve a single class-wide injury with some combination of injunctions. In *M.D. ex rel. Stukenberg v. Perry*, for example, a (b)(2) class of foster care children

[36] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (concluding that "respondents' claims for backpay were improperly certified under" Rule 23(b)(2) on the ground that "claims for monetary relief may [not] be certified under that provision[,] . . . at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief").
[37] *Id.* (emphasis added).
[38] 138 S. Ct. 830, 851–52 (2018).